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THE THEORY OF RELEVANCY

THERE is probably no legal question in Scotland which so regularly agitates the minds of Judges high and low or of counsel and solicitors as the highly debatable matter of relevancy. The plea to the relevancy and the debate on relevancy are the occasions of more thought, research, questioning, doubt, hesitation, despair, disgust, or philosophic calm, followed by satisfaction or disappointment, than most steps in litigation. To a layman relevancy is probably one of the high-water marks of the cabalistic occultism of the lawyers' black art. Apart from anything else, hardly any legal adviser can concisely yet adequately explain what is involved. Books on practice give comparatively little assistance though there is no doubt that the institution is of decent antiquity in Scots law. Stair[1] says the meaning is " that though the points alleged were proved, they would not justly infer the point deduced from them ", and elsewhere[2] gives as an instance of the *nobile officium* of the Lords that they allow proof before answer as to the relevancy.

With the history of the plea we are, however, not concerned herein, as this essay seeks to determine the nature of relevancy as it exists at present, and to ascertain on what bases relevancy of a record may be challenged, that is, what tests may be applied to determine the relevancy or irrelevancy of a case.

In the first place the word relevancy, like so many more terms of the law, suffers from having at least three distinct connotations which require to be carefully distinguished.

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[1] IV, 39, 12

[2] IV, 3, 7; IV, 39, 5. Cf. Ersk. IV, 1, 69.

There is relevancy of evidence, which signifies that the matter of evidence establishes or tends to establish the existence or non-existence of some fact which is in dispute and upon which the conclusion in law depends. This meaning is only mentioned here to be set aside as outwith the scope of this article. Relevancy as applied to pleadings is rather different, however, and a full appreciation of the meanings can only be obtained by attaining some understanding of the nature of the whole conception. Provisionally, however, it may be defined as being the sufficiency of the averments to justify the conclusion in law. It consists in setting forth in the written pleadings such facts and circumstances of the particular case involved as, taken together, will, if admitted or proved to be true, justify the Court in granting the remedy sought by the pursuer or, in the case of defences, in decreeing the defender's liberation from the claim made against him. The last significance is the relevancy of a representation of fact as specifying the fact for the purpose of giving notice for proof : this is the point commonly taken as " lack of specification ". It follows that the converse of these meanings will constitute irrelevancy. In *Gillespie* v. *Russel*[3] Lord President McNeill sought to distinguish these two meanings. " The word relevancy ", he said, " is used in two senses. It is used with reference to criticism on the record . . . . In that sense, I have no doubt that this action is relevant; that is, that it expressly sets forth these facts. . . . But relevancy has another more general and important meaning ; as regards the general aspect of the action, and involving what may sometimes be the whole matter of the action, whether the averments be such as to support the conclusion. In every case where there is not proof or inquiry into the facts, the whole question is sometimes one of relevancy. There are some cases which must go to proof on matters of fact, in which are involved questions of law and relevancy. These questions of law or relevancy may afterwards be determined. Again, these questions are sometimes settled before going to trial, but sometimes it is expedient not to do so."

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[3] 1857, 19 D. 897, 909.

Reduced to its essentials, the Scottish system of pleading involves stating conclusions, or general requests for the particular form of legal remedy desired by the pursuer, and supporting these by a condescendence or statement of those facts of the particular case which the pursuer believes to be and offers to prove true, and which, he thinks, justify him in asking for that remedy. Among these statements of fact by the pursuer are interpolated the defender's answers thereto : the whole is completed by pleas in law for each party requesting the Court's action in the ways concluded for with special reference to the facts of the case, such as granting or refusing a decree sought, or rejecting the contentions for the opposing party. The remedy sought in the crave or conclusions of the summons is therefore a legal one of general applicability to certain circumstances and this is focussed on the particular case by a relative plea or pleas in law annexed to the condescendence and answers. But the condescendence itself is a connected coherent statement of facts and facts only, not of law, nor should it contain any legal submissions or arguments.[4] The facts are those of the particular situation which has necessitated the action as seen by the pursuer, together with the defender's answers, comprising an acceptance or rejection of those contentions of fact. Hence some connection must be established between the facts averred on either side and the law sought to be made applicable by either party in the particular case and this relation is the core of the problem of relevancy. The question is : Do the averments of fact focussed by the pleas-in-law support the conclusions of the summons? If not, the action is irrelevant.

In analysing the interaction of statements of fact and contentions in law which goes to make up relevancy it is preferable to start from the side of the law sought to be invoked. Now the law as we know it consists of a vast and constantly growing number of general propositions or statements of principle, such as that a person whose spouse has committed adultery with another person may divorce that spouse, or that a person injured by the (legally) negligent conduct of another person may recover damages from that other person in compensation for his injury, or that a buyer whose seller has not delivered goods which have been sold to him may recover damages for the breach of contract in respect of non-delivery, or that a person who is a child of a certain deceased person may recover a share of the estate of that person quite apart from rules of devolution on intestacy or the provisions of a will, and so on. There are infinite examples of these principles and they go on multiplying as new cases arise for determination. The novelty of a claim is never by itself a bar to an action in our law and the reported cases multiply the lists of circumstances where one remedy or another has been held applicable or inappropriate and they thereby widen or narrow the scope of various principles. In every case, of course, there are various prerequisites and conditions, such as jurisdiction and a sufficient title to sue and so on, but discussion of these matters goes beyond the scope of this essay and can be found in the works on Practice.

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[4] See Lord Blades on "The Art of Pleading", in 1948, 64 S.L.R. 25.

Some of these propositions of law are established by statute: for instance, statute lays down that when one spouse "has wilfully and without reasonable cause deserted the [other] and persisted in such desertion for a period of not less than three years", the other spouse may have the marriage dissolved by the Court on the ground of that desertion. From this statutory provision may be formulated the general proposition of law which justifies and renders relevant actions of divorce for desertion. A proposition may also sometimes be found in the writings of the institutional writers. An example is the widow's claim to *ius relictae* from her husband's estate. Such a claim is relevant in the last resort on the authority of institutional writings as subsequently accepted and interpreted in cases decided in the Courts.

But the great majority of the propositions of our law, even of those fundamentally and originally established by statute or institutional writing, are propositions largely or entirely of common law, which are most frequently not to be found laid down in express terms anywhere but which must be derived from the judgments in decided cases, from the Judges' opinions and *dicta* and from authoritative writings on the subject in issue. A most valuable function of the text-writer is to distil from a synthesis of confusing and sometimes inconsistent judgments in past cases, statutory provisions, institutional texts, *dicta* and expert criticism, an accurate statement of some of the more important propositions of law. But the majority of propositions are not to be found neatly set out in any book. It need hardly be added that in many cases any particular formulation of a proposition is not everywhere acknowledged. There may be no acknowledged proposition at all. In the absence of an acknowledged proposition applicable to the particular case before him, a pleader must seek to formulate a new legal proposition on the basis of inferences and analogies from existing ones, judicial *dicta*, and the opinions of text-writers, and then try, by argument and reference to these authorities, to get the Court to accept the new proposition as valid.

While the principal source of these propositions of law is the judgments of Courts, it is not every judgment or part of a judgment which can be utilized to supply a proposition of law which can be founded on subsequently. Not every judgment contains any proposition of law : the decision may be one purely on the facts of the particular case before the Court and it may decide the issue without saying on what ground of law.[5] In any event it is only by almost invariable practice that the Court of Session, like superior Courts elsewhere in Anglo-American countries, gives reasons as well as an actual judgment on the point in dispute. Sometimes the Court does not. In the Sheriff Court the obligation to do so is statutory.[6]

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[5] For example, *Armour* v. *Glasgow Royal Infirmary*, 1909 S.C. 916, where the Second Division adhered to the Lord Ordinary, whose ground of judgment is at least obscure.

But every case which is of value subsequently as a precedent contains somewhere in the judgments at least one proposition or general statement of the rule or principle of law which that Judge conceived to be applicable to the facts of that particular case then before him and on which he proceeded when deciding it. This statement of principle on which the Court proceeds is not necessarily the *ratio decidendi* of the case. Of course, there may be more than one principle expressed in an opinion and different Judges of an appellate Court may concur in the result though founding on different principles. They may even concur in the principle but express it so differently as to be virtually several different principles. It is possibly a failing of the British judicial system that the admission of several opinions in one case before an appellate court permits different principles to be formulated with reference to one case and this is productive of infinite hair-splitting and argument if the case is sought to be used as a precedent. Both sides in a subsequent case may found on the earlier one but on different parts of the judgments. This variety, however, may be more suggestive and stimulating with a view to future extensions.

It is apparent now that from the point of view of relevancy a case which does not contain somewhere in the judgments an expression of principle is virtually useless as an authority for subsequent cases. The distinction between principle of law and *ratio decidendi* of a case requires further examination. The *ratio* of any case is framed by the Judge with reference to the particular case before him: it is not necessarily to be found in the reasons given in the opinion. It is found by taking account of all the facts found by the Judge and treated by him as material and none of the immaterial facts, and, secondly, the decision in law which he bases on them.[7] But in addition a Judge commonly expresses in his opinion a statement of the general rule, principle or proposition of law within which he conceives the *ratio* of that case falls. This proposition may be expressed in the judgment in narrow or in wider terms and this vitally affects the applicability of the principle as a basis for determining the relevancy of a subsequent case. If a narrow principle be chosen, a subsequent case, unless it falls precisely within the principle, can only be founded on that principle by analogy, by extending it, or by seeking to persuade the Court to accept a wider significance for some term of that proposition. On the other hand, if a wider formulation be expressed in the precedent case there is always the danger that the Court in a subsequent case may decline to accept the principle stated in the precedent case and seek to limit it as being too wide and general. Of course, any principle, in whatever terms expressed, may be reviewed and declared unsound, as where an established precedent is overruled by a superior Court in a subsequent case.[8]

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[6] Sheriff Courts Act, 1907, Sched. I, Rule 82

An example of the distinction between *ratio* and wide and narrow formulations of principle may be found in the well-known case of *Donoghue* v. *Stevenson*.[9] So far as appears from the judgments the material facts in *Donoghue* were (a) the sale and supply by a third party to the consumer (pursuer) of (b) a bottle of ginger-beer manufactured by the defender, (c) which contained a decomposed snail, (d) the presence of which was due to lack of care by the manufacturer, which (e) could not reasonably have been detected by the third party, and which (f) injured the pursuer who was found entitled to damages from the manufacturer. Various other facts were found by the Court but they were non-material and did not affect the result, *e.g.*, the fact that the pursuer was female. From these ascertained material facts and judgment the *ratio* may be deduced :—

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[7] On this see further Goodhart: "The Ratio Decidendi of a Case" in *Essays in Jurisprudence and the Common Law*, 1, 25.

[8] For example, *Lennie*, 1950 S.C. (H.L.) 1, overruled *Goold*, 1927 S.C. 177.

[9] 1932 S.C. (H.L.) 31.

S., a manufacturer for profit of ginger-beer, distributed in opaque sealed bottles, owes a duty to the eventual consumer of the ginger-beer to take reasonable care that snails do not get into his bottles of ginger-beer during manufacture, and he is liable to Mrs. D. for injury caused by his failure in that duty.

Lord Macmillan gave expression to the narrow principle of law founded on that *ratio* in these words:—" Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles ". It will be seen that this is a proposition wider than the *ratio* which was absolutely necessary for the decision of the case.

Lord Atkin's formulation of the general principle of law was in these terms:—" A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care ". Observe the extension from " ginger-beer " in the *ratio* to " food and drink " by Lord Macmillan and to " products " by Lord Atkin.

But both of these principles are considerably narrower than what was expressed in Lord Atkin's famous *dictum*, where he said: " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure . . . persons who are so closely and directly affected by [your] act that [you] ought reasonably to have them in contemptation as being so affected when [you are] directing [your] mind to the acts or omissions which are called in question ". This *dictum* is a very much wider generalization than was ever necessary for the decision of *Donoghue*, or even of that class of cases and its very generality renders it liable to mislead if applied in inappropriate connections.

A *ratio* then is the legal rule justifying a particular legal conclusion in a particular case on the basis of certain ascertained material facts. A principle or proposition of law is a general statement of law covering the several *rationes* of different individual cases of the same kind and expressing the general legal conclusion to be inferred from the several *rationes*.

It is of course only too well known to every pleader that he can but rarely hope, apart from the few stereotyped actions which go through without question and as a matter of course, to find a true precedent, that is, a case whose *ratio* on analysis coincides in all material terms and is therefore entirely applicable to the case whose facts are before him and which he is seeking to mould into a relevant action. More often the pleader is faced with a case to which he cannot find anything at all similar in the Digests or textbooks, and to which no prior *ratio*, or existing principle based on a synthesis of *rationes*, seems applicable. Recourse must then be had to analogy and to the formulation of a new principle of law based on existing ones and on wider judicial statements, such as that of Lord Atkin, and *obiter dicta*. The pleader may seek for analogy, that is, for a case whose *ratio* coincides in at least some material facts with the corresponding material facts of his own case. Then he has to compare the remaining facts and determine whether the differences are essential or inessential. No criterion can be laid down to determine this and every instance must be considered separately. A difference in the pursuer's age or sex between the precedent and the present case may be essential or it may be inessential, and so with every other discrepancy. If essential differences do exist, the problem is then :—Is the prior case sufficiently alike in most material respects to be founded on by analogy as a persuasive precedent?

Reference may be made at this point to the opinions of the Judge or Judges who decided the prior case, even if their *rationes* cannot be founded on. Their speeches may and regularly do contain some general statements of law pronounced on the basis of the *ratio* they utilized in that case and with it in mind, though more generally expressed. Such a statement may give the inquiring pleader a valuable indication of whether the principle of the earlier case is capable of extension by analogy to cover a new set of facts which resemble it in certain material respects. So in *Donoghue*, as we have seen, the term of the *ratio* was "bottle of ginger-beer". But Lord Macmillan in his formulation of principle, makes a general statement about "articles of food and drink" and Lord Atkin says "products". Hence a pleader, faced with a case involving, not a snail in a bottle, but a mouse in a loaf of bread or a beetle in a meat pie would seem, *prima facie*, well entitled to consider that the principle which covers the *ratio* of *Donoghue* is extensible to such a case.

Such was the kind of question which arose in *Grant* v. *Australian Knitting Mills, Ltd.*[10] where the product in question was woollen underclothing. It was held that the *ratio* founded on these facts also fell within the bounds of the principle whose prior exemplar was *Donoghue*. If not quite covered by Lord Macmillan's statement of principle it did fall within the wider expression given by Lord Atkin.

But the fact must not be lost sight of that these judicial generalizations on the basis of a particular *ratio* may be inaccurate even though the decision of the case and its particular *ratio* be unimpeachable. If the principle is too narrow, no harm is done: it is valid, but not exclusive. So, too, Lords Macmillan and Atkin in *Donoghue* spoke of "manufacture": but it has subsequently been held that circumstances may bring a distributor of goods,[11] a repairer of goods,[12] and a supplier of goods[13] within the same principle, though each case was a distinct *ratio*. Indeed it is a question what are the bounds of the principle. At present they are undetermined.[14]

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[10] [1936] A. C. 85.

[11] *Watson* v. *Buckley*, [1940] 1 All E.R. 174.

If, however, the statement of principle in a judgment is too widely expressed, it is so dangerous as to be virtually useless, even though the *ratio* on which it was based in that case remains valid. There are many such examples in older cases. To cite only one famous instance, Cotton, L.J., said in *Sottomayor* v. *De Barros*[15]: "It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile". In that case the contract in question was marriage, for which this statement is valid, but it is now recognized that there was no justification for laying down such a wide principle, applicable in terms to all contracts, where in fact it is not valid. As a statement of general principle that sentence is inaccurate and too wide, and hence useless to found on as a principle for later cases.

With regard to the acceptance or rejection of principles previously laid down, it is worth bearing in mind what Sir George Jessel, M.R., said[16]: "I have often said, and I repeat it, that the only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided; but it is not sufficient that a case should have been decided on a principle if that principle itself is not a right principle, or one not applicable to the case; and it is for a subsequent Judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle".

Many such general statements of principle are collected in modern textbooks with listed instances where the principle has been applied but even then it is not always that a principle can be traced which it can reasonably be thought will be accepted by a Court and still less by the opposing party to the litigation. In many cases the opposing party will challenge the proposition on which a case is founded whatever it may be, and it is only if all the material facts of the present instance agree with all the material facts of the precedent case that the *ratio* and hence the principle of the precedent case are entirely applicable and the precedent is a binding one and any challenge necessarily unsuccessful. There is superadded to this the fact that by the rules of *stare decisis* a binding precedent may no longer bind if the case is appealed to a Court superior to that which laid down the *ratio* founded on.

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[12] *Herschtal* v. *Stewart & Ardern, Ltd.*, [1940] 1 K.B. 155.

[13] *Stennett* v. *Hancock*, [1939] 2 All E.R. 578.

[14] See Viscount Simon in *Lockhart* v. *Barr*, 1943 S.C. (H.L.) 1, 2.

[15] (1877), 3 P.D. 1, 5.

[16] *Osborne to Rowlett* (1880), 13 Ch.D. 774, 785.

Suppose then that the pleader has found, if not a *ratio*, at least a principle which he thinks can be made applicable to the facts of his own case. The question still remains how he can frame a relevant case. It is necessary to analyse the principle chosen and determine the material elements which make it up, and then to segregate the material facts, so far as known, about the case before him. If the latter set coincide with the former the principle is applicable. More often than not the two series will not coincide in more than a few respects. It follows that the principle is not strictly applicable as it stands, though it may be, and the pleader, if he chooses to proceed on that basis, must seek to persuade the Court that the proposition is extensible to be so applicable, or that it should be restated in terms sufficiently wide to meet the terms of the present case.

Turning now to the consideration of the facts of the case : the pleader starts with the difficulty that the facts of the particular case before him are not yet finally determined : some of them are probably still unknown, and all depend on the possibly scanty reports and precognitions he has before him. Furthermore the facts may eventually come out differently in Court, when lapse of time, the strain of recollection, and cross-examination have all disturbed what was possibly even originally a fairly hazy and inaccurate observation. It is as yet impossible to say which of these facts he will be able so to establish by competent and trustworthy legal proof as to convince the Judge of their existence in the form desired by him. At the pleading stage all that he can do is to assess for himself the reliability of the evidence he has then at hand and to judge as best he may whether the statements appear reasonably accurate and are consonant with any accurately predetermined facts and with one another. Then he must pick out what appear to him, in the light of his experience and knowledge of past cases of a similar nature, what are the material facts. To state a relevant case he must then set down in the condescendence all those facts which he believes are material, that is, all the facts which if admitted or proved will, in his submission, entitle the Judge to apply the proposition of law he has in mind and grant the decree he seeks. Of course the condescendence must also contain much which is non-material from the point of view of the legal principle involved but which must be particularized to inform the defender of what specific instances the pursuer founds on. This is the subsidiary kind of relevancy of which more will be said later. Failure in this respect will lead to the plea commonly taken along with that of relevancy proper, that the pleadings are " lacking in specification ".

The framing of defences, condescendence and claim, counter-claim, and so on follow much the same course. The aim is always to match a statement of facts alleged to exist in the present instance with at least most of the significant terms of a general proposition or principle of law derived from past cases, which is conceived as acceptable to the Court and justifying its intervention in the shape of the decree desiderated in the present instance.

It remains now to consider the matching of the principle of law and the averments of facts. Mr. Justice Holmes once said: " The life of the law has not been logic: it has been experience ", but there seems to be something of logic about the analysis of relevancy in Scottish pleading, though it is not contended that the rules of formal logic are strictly applicable. It is little wonder that Scottish lawyers have not infrequently been philosophers. In its most general form relevancy can be expressed in this syllogistic form :—

> Any pursuer X in circumstances ABCDE against the defender Y is entitled to remedy R. My client P is in circumstances ABCDE as against your client D.
>
> Therefore P is entitled from D to remedy R.

The major premiss of the syllogism is the established or proposed principle of law which is sought to be invoked in this case; the minor premiss is the condescendence of material facts in the present case now before the Court, and the conclusion represents the legal justification for granting the decree or remedy sought. In short, to make a relevant case, the pleader is trying to construct a valid legal syllogism.

The above form of syllogism will represent the case where the principle founded on gives a true precedent and the material terms in the *rationes* of earlier cases justifying that principle and of the present case coincide. Where a pleader seeks to bring a new case within a wider existing principle the form of the syllogism is :—

> If X in ABCDE to Y gets R and P is in ABDE to D, then P from D should get R.

On the other hand where the pleader is attempting to bring a wider set of material facts within a narrower principle based on narrower *rationes* of earlier cases the generalized syllogism reads :—

> If X in ABCDE to Y gets R and P is in ABCDEFG to D, then P from D should get R.

In the last two cases the conclusion is only the pleader's contention, and one need not be a logician to see that the conclusion does not necessarily follow from the premisses. It *may*, but only if in the former case the Court hold that the omission of the material term C from the present set of facts does not affect the applicability of the established rule of law, and, in the latter case, if the Court will widen the existing principle of law by including the extra terms FG, as by extending the previously accepted scope of the principle, as from "food and drink" to "products".

This analysis also gives the clue to the challenge of relevancy, the plea, and the resultant argument on relevancy. The plea and the consequent debate impugn the validity of the other party's proposed syllogism. It is not, however, suggested here that relevancy can be determined purely by application of rules of formal logic. The analogy of logical analysis does, however, assist in the discovery of a test of relevancy. It is for the Judge to decide whether or not a condescendence, or defences, or condescendence and claim, as the case may be, is relevant, and he may desire to ascertain the facts fully before so deciding by the expedient of allowing a proof before answer. If the case is fully relevant, the facts averred have yet to be proved and if they are satisfactorily established, decree necessarily follows.

It should be noticed that the principle of law contended for may not be readily apparent from the record. It must be derived from the general tenor of the averments in the condescendence : there must somewhere be averments which indicate in general terms what proposition of law is contended for as being applicable. Of course if there is no discoverable legal proposition underlying the facts averred the case is necessarily irrelevant.

The opposing party, having then discovered what principle of law the pursuer contends for as being applicable to the facts in his condescendence, may challenge it as irrelevant on several grounds. These can be considered generally as amounting to the contentions (i) that the principle is not a sound principle of law, or (ii) that it may be sound in general but is not applicable as between the parties to the present action, or (iii) that it is not applicable to the set of facts averred in the rest of the condescendence. In addition there may be a challenge to relevancy on the ground of specification. In making the challenge regard must be had to the contentions as they are set out by the party attacked, supplemented only by any admissions made by the attacker.[17]

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[17] *Pringle* v. *Bremner*, 1867, 5 M. (H.L.) 55.

If we consider now an attack on relevancy under the first of these heads, a recent example will illustrate what is meant. In *Goold* v. *Goold*[18] the legal proposition was determined that the wilful refusal of marital intercourse by one spouse might constitute desertion which would justify a decree of divorce. The principle was applied in *Burrell*,[19] where it failed on the facts. But in *Lennie*[20] it was held by the House of Lords that the refusal of marital intercourse by one spouse could not constitute desertion without an overt act of desertion. *Goold* was overruled and hence any case framed hereafter on the basis of the principle of *Goold* may justifiably be challenged as irrelevant, the principle having been declared unsound. The same idea is at the basis of every case where a prior case which is in point as a precedent is attacked as being unsound.

The precise formulation of a valid principle of law for use as a major premiss in the relevancy syllogism may be a matter of extreme difficulty and only be determinable by an arduous process of construing words and phrases. For instance, in *Millar* v. *Galashiels Gas Co.*,[21] the basis of the proposition contended for was statutory. The Factories Act, 1937, s. 22 (1), as interpreted by section 152 (1), provides that every lift shall " be properly maintained in efficient working order ". The pursuer submitted that the true proposition of law was :—An occupier of a factory is under [an absolute and continuing duty] to maintain a lift in efficient working order. The defenders, on the other hand, contended that this should be . . . under a duty [of reasonable diligence] to maintain . . . . The House of Lords held that the former was the proper interpretation of the words in the Act and hence the true proposition. " In section 22 (1) ' maintained ' is employed to denote the continuance of a state of working efficiency. Hence no averments of any reasonable care are relevant in defence. The proof of even a momentary state of working inefficiency is enough to render such defences irrelevant."

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[18] 1927 S.C. 177.

[19] 1947 S.C. 569.

[20] 1950 S.C. (H.L.) 1.

[21] 1949 S.C. (H.L.) 31.

Similarly in *Duncan* v. *Church of Scotland Trustees*[22] the case turned on the interpretation of a clause in a disposition, any obligation under which being held not to have transmitted to the defenders so as to render them liable. Many cases relating to wills and settlements turn on the interpretation of some term of the deed in question. Again there are the disputes on the scope and meaning of a word, as in a Finance Act, *e.g.*, *Lord Advocate* v. *Mirrielees' Trs.*,[23] or the proper construction of a contract.[24]

Another kind of question not infrequently debated on relevancy under this same head of challenge is the question whether a breach of some statutory duty, even if proved, infers any civil liability on the party in breach to make reparation in damages to the party damnified by the breach. The pursuers' argument is that the true principle of law is :—The defender is in breach of the statutory obligation incumbent on him under [a particular Act] which caused me loss and injury and he is liable to me in damages therefor. The defender denies the validity of this, so far as it relates to the liability for damages consequent on the breach. The answer can only be found by the judicial interpretation of the particular Act in question and especially of the material Part and Section, and there are various judicial *dicta* which may assist to determine the question—does this Act confer any such right to damages on an injured pursuer? There are also various past examples which may provide analogies. Yet in the absence of a precedent which is in point, it remains a proposition proponed and impugned and determinable only by the Court by a process of interpretation of the Act concerned.[25]

Matters of interpretation again are commonly at the root of pleas to the relevancy of claims in multiplepoindings, where the general nature of the argument frequently is generally to the effect that on a proper interpretation of the documents, such as testamentary writings, which are in issue, the competing claimants have not a valid claim.

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[22] 1941 S.C. 145.

[23] 1945 S.C. (H.L.) 1.

[24] *McKillop* v. *Mutual Securities*, 1945 S.C. 166.

[25] See *Cutler* v. *Wandsworth Stadium*, [1949] A.C. 398.

Some other matters which can be attacked in the same way are the question whether the duty of care averred in a negligence case exists at all, *e.g.*, *McLaughlan* v. *Craig* [26]; whether an admitted duty of care extended so far as to be owed in the circumstances to the pursuer, *e.g.*, *Bourhill* v. *Young* [27]; or the extent in time of the necessity of willingness to adhere in desertion, *e.g.*, *Bell* v. *Bell* [28]; or a breach of statutory duty in respect of a place not covered by the Act imposing that duty [29]; or the extent of a duty of inspection.[30]

The second group of challenges of relevancy may be brought under the general heading that the proposition of law is valid but is not applicable between the parties to the action. Under this head are special defences and exceptions such as privilege in defamation, immunity in one form or another, such as diplomatic immunity, or the privilege of the Crown in certain circumstances,[31] or counsel's immunity from an action for professional negligence,[32] or the protection afforded to a hospital in a matter of an employee's professional duty,[33] or the protection (after a period) afforded by the Public Authorities Protection Act.[34] The submission is in such a case that the circumstances confer an extra right on one party which renders an otherwise valid proposition of law inapplicable to him. Possibly the commonest case of this kind is that of privilege in defamation. To the pursuer's proposition of law and relative condescendence of material facts the defender opposes certain facts which in his submission necessitate the admission of extra terms in the proposition of law if the case is to be relevant. So if we frame the proposition of law as follows: A pursuer of and concerning whom false, defamatory, and malicious statements are uttered is entitled to damages from the defender who made them; the defender's contention under this head of relevancy is that this is true so far as it goes but that additional elements must be added, namely—except when fairly made in the exercise of a duty so to act and where there was an interest so to speak. Of course this raises the question whether the facts averred will substantiate the precise instance before the Court as a suitable one for the application of the exception of privilege. This falls to be determined by reference to the *rationes* of precedent cases, to judicial *dicta* and to analogy.

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[26] 1948 S.C. 599.

[27] 1942 S.C. (H.L.) 78.

[28] 1941 S.C. (H.L.) 5.

[29] *Ward* v. *Coltness Iron Co.*, 1944 S.C. 318.

[30] *Rush* v. *Glasgow Corporation*, 1947 S.C. 580.

[31] For example, *Lord Advocate* v. *Barlow*, 1922, 38 Sh.Ct.Rep. 182.

[32] *Purves* v. *Landell*, (1845), 12 Cl. & F. 91, 103.

[33] *Davis* v. *Glasgow Victoria Hospitals*, 1950 S.C. 382.

[34] *Lanart* v. *Clark*, 1945 S.C. 1.

The pursuer may in turn reply to the plea of privilege by adding a further term to the proposition in the shape of averments of express malice and possibly also of want of probable cause, but if his statements reveal that this is only colourable pleading, the objection to relevancy may nevertheless be sustained.[35]

The crux of this kind of proposition is the question whether the position of the parties to the case and the particular circumstances of the alleged slander will admit of the application of the exception of privilege and the counter-exception of malice. If the facts relative to the particular parties will let in privilege, then the principle of law to be applied in the case must include those terms. So too malice may or may not have to be included and the form of the final proposition determines what must, if the case is to be relevant, be averred and put in issue and proved. In *Neville* v. *C. & A. Modes, Ltd.*[36] a pursuer in a slander action averred that certain shop assistants who detained her for alleged theft were acting "in the course of their service with the defenders" and she sought to make the defenders liable therefor. The defenders challenged the relevancy of this averment, and Lord Moncrieff observed[37] that the true test of relevancy in such a case must be found in the estimate made by the Court

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[35] *Mone* v. *Anderson*, 1842, 4 D. 786. See *Watt* v. *Thomson*, 1869, 8 M. (H.L.) 77.
[36] 1945 S.C. 175.
[37] At p. 181–2.

"of the proper purport of such averments as set forth as a matter of fact (First) the particular duty which was performed by the employee, and (Second) the position of the employee in the service and on the staff which is claimed to have qualified him to discharge that duty as representing his employer".

In cases of this kind much turns on whether or not the parties come within the categories of persons who have been held or can be held to enjoy the privilege or position claimed. Thus it is a matter of decision that Judges enjoy absolute privilege and that employers and persons *in loco parentis* have qualified privilege in certain functions relative to their charges and so on. But it may well not be decided whether parties of the particular station and relative position of the parties to the case before the Court do enjoy any privilege or not.

The third possible line of challenge to relevancy is that the major premiss or principle of law, though true, is not applicable to the facts elsewhere averred. So, for example, we may accept that in law an occupier of heritable property is under a duty to take reasonable care to prevent damage to persons on his property from unusual dangers of which he knows or ought to know. That proposition, it has been decided however, is applicable only to the individual who came on these premises as an invitee, that is, in pursuance of some business or material interest common to him and the occupier. Therefore, while this standard of duty to such a person may be accepted as a valid major premiss, it is only if the rest of the condescendence reveals facts and circumstances which will, *ex facie*, reasonably bring the pursuer within the category of invitee as above defined that the major premiss is properly applicable to the minor.[38] The attack in such a case is concentrated on the minor premiss, that it does not bring the party within the scope of the proposition of law involved. To constitute an adequate minor premiss it is not enough simply to aver invitation, but it is necessary to state in the condescendence a series of facts and circumstances which taken together amount to bringing the pursuer within the category of invitee. This, of course, may raise the subsidiary legal point, whether those particular facts can ever amount to invitation. This question has to be dealt with in the same way as before, by examination of the particular cases and *rationes decidendi* thereof which bear on the subject of invitation and their interpretation as applied to the facts of the case before the Court. Putting the matter analytically, term B of the proposed minor premiss must be challenged and examined to see if it is truly " B " and not just " b " or even " β ". If it is not truly B then the whole edifice tumbles.

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[38] See *McPhail* v. *Lanark County Council*, 1951 S.L.T. 32.

Such a question may be a narrow and anxious one. The *rationes* of past cases tell us that guests in hotels and customers in shops on business are invitees and that burglars in private houses are not, but what of many other sets of circumstances? If there is no *ratio* applicable recourse must be had again to statements of general principle and even to *obiter dicta* for assistance. Having determined that the individual in the circumstances averred is or is not an invitee one can say whether or not the duties applicable to that category are relevantly averred. So, too, in a multiplepoinding raised to determine the ultimate destination of a fund much will turn on bringing the claimant within the category of persons who are determined as a matter of law to be entitled to take.

It is obvious that in many cases of this kind the case fails as a matter of relevancy simply by the omission of an averment of some material fact without which the pursuer does not come within the ambit of the legal principle. A minor failure in this respect may frequently be cured by amendment. Some examples are: failing to say that a slander was false[39]; failing to aver a duty of inspection and repair of heritable property or knowledge of the defect which caused the accident[40]; failure to aver that the vehicle which caused the injury was driven by the defender or a person for whom he was responsible[41]; failure to aver fear of bodily harm in a divorce for cruelty,[42] and so on.

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[39] *Meikle* v. *Wright*, 1893, 20 R. 928.

[40] *Paterson* v. *Kidd's Trs.*, 1896, 24 R. 99.

A certain element of possible confusion is introduced by the question of multiple cases in one record. The pursuer, that is, may ask for more than one remedy either alternatively or cumulatively, or he may seek one remedy on more than one ground, stated alternatively or cumulatively. Common examples of the first kind are actions with a declaratory and an executory conclusion, or for specific implement, failing which, damages. Of the second the commonest example is an action of reparation founded on negligence at common law and by breach of statutory duty.

In the case of alternative averments of facts, relevancy must depend on the weaker alternative, as that is the only one which the pursuer absolutely offers to prove.[43] If the alternatives are inconsistent and one of these is not relevantly stated, the action falls to be dismissed as irrelevant[44]; but, even though the alternatives be contradictory and even mutually exclusive, the case is relevant if either alternative would, if proved, infer liability on the part of the defenders.[45] It has been observed that alternative grounds of action must be distinguished by clear and precise language in the averments and pleas in law. For the purposes of the analysis of relevancy each case must be tested on its own in the manner already discussed, and if two parts of a multiple case be stated, not alternatively, but cumulatively, that is, as two or more series of averments stated separately, either or any of which may justify the legal conclusion sought, it is quite possible to have one series of averments dismissed as irrelevant and the other accepted as relevant for proof. But this is only possible when the two distinct cases are stated *separatim* and therefore cumulatively. If stated just as alternatives the whole case would fall.

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[41] *Anderson* v. *Glasgow Tramway Co.*, 1893, 21 R. 318.

[42] *Duffy* v. *Duffy*, 1947 S.C. 54.

[43] *Hope* v. *Hope's Trs.*, 1898, 1 F. (H.L.) 1.

[44] *Murray* v. *Wylie*, 1916 S.C. 356. But see *Smart* v. *Bargh*, 1949 S.C. 57.

[45] *Clarke* v. *Edinburgh & District Tramways Co.*, 1914 S.C. 775. See also *Campbell* v. *United Collieries*, 1912 S.C. 182.

The less important kind of relevancy in regard to pleadings remains to be discussed. The substance of this objection is that the statements objected to are not sufficiently specific. In many cases the Court requires averments to be specific, as by want of notice the defender is put to an unfair disadvantage and he is therefore entitled to have the grounds of action specifically detailed in the condescendence. Examples of this are legion. Averments of fraud must be minute and specific[46]; details of dates and places of alleged acts of connection must be given in actions of affiliation[47] and adultery; again, where a warranty is in question the exact words must be quoted[48] and the particular quality which is warranted thereby[49] and the particular purpose for which goods are sold.[50] In cases of slander, if the words complained of are not obviously slanderous, the pursuer must set out facts and circumstances which will make clear the defamatory meaning[51] and if innuendo be necessary, it must be specifically set forth on record.[52]

Lastly, mention may be made of the fact that the Court has a power to order the deletion of certain averments from the record if these are irrelevant in respect that they relate to collateral matters proof of which would not further the case and would only introduce extraneous matter,[53] and improper averments may similarly be deleted.

The understanding of relevancy depends in the last resort on experience and a wide knowledge of legal principle and of the way in which problems of relevancy are approached in practice. The multifarious nature of legal actions and the enormous variety of circumstances involved precludes any full and complete analysis of relevancy but it may be that the syllogism theory provides a clue to this nebulous and difficult conception of our law.

DAVID M. WALKER.

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[46] *Thomson* v. *Pattison*, 1895, 22 R. 432, 435.
[47] *Walker* v. *Walker*, 1869, 41 Jur. 502; Fraser, *Husband and Wife*, pp. 1239, 1245.
[48] *Mackie* v. *Riddell*, 1874, 2 R. 1115.
[49] *Rose* v. *Johnston*, 1878, 5 R. 600.
[50] *Dunlop* v. *Crawford*, 1886, 13 R. 973.
[51] *Brydone* v. *Brechin*, 1881, 8 R. 697.
[52] *Murdison* v. *Scottish Football Union*, 1896, 23 R. 449, 463.
[53] For example, *A.* v. *C.*, 1922 S.L.T. 34.

THE "CRIMINOLOGIST": A KING WITHOUT A COUNTRY?[1]

AT the Paris Congress of Criminologists this summer, Thorsten Sellin, Professor of Sociology at the University of Pennsylvania, called the criminologists "kings without a country".[2] One may readily understand why he said so. The criminologist is moving continually in the fields of others, sociologists, biologists, psychologists, psychiatrists. But is it really true that on this account he is a king without a country? He is studying a rather well defined part of human behaviour, to wit, that which we call "crime". Is not this a field as well delimited as any other? No branch of science thrives without the aid of others, and, in its turn, every distinct part of knowledge is of assistance to others. In the case of criminology the dependence upon other parts of science is greater than anywhere else. The principal reasons for this are:

1. Crime is a piece of human behaviour of a qualified kind: it is "mis" -deed, "mis" -demeanour, "bad" conduct, that ought not to be there but, nevertheless, is there. To define this conduct we use two different forms of human thinking: causal and normative thinking. It is for this reason that criminology has its roots in two different methods of science.

2. Human behaviour that ought not to be there presupposes an authority determining which conduct is good and which is bad. This authority may be either God or man himself. The field of criminology as well as that of criminal law is on the borderline of faith and science.

Notwithstanding these difficulties there is for the criminologist a wide enough field, and this field covers much the same ground in Western Europe, America, the British Commonwealth and even in great parts of Asia and Africa. It is quite true that the rules of law and ethics differ in the various parts of the world. Facts abhorred as the most abominable of crimes are allowed, and even encouraged, in other times and in other countries. Anthropologists and ethnologists have laid great stress on this fact,[3] and philosophers have thought that therefore it would be quite impossible to define crime. Now all this may be very confusing, but at the same time we are able to state that everywhere crime is a fact disturbing the peace and endangering the continuance of society. Many criminologists have tried to give a universal definition of crime. Some of them maintain that one cannot go further than that crime is: "what is forbidden by the law of a given country at a certain time". Now this definition is certainly far from universal, though—if we accept it—we still have a wide field in which we may unanimously study the causation of crime. But I think we might go one better and define crime as *a harmful and at the same time immoral act, causing so much unrest in a certain society, that this society is or might be justified in reacting by disapproval and intentionally giving pain to the author of the act.*[4] This definition has the great advantage over the legal one, that it is possible to include such phenomena as suicide, prostitution, homosexual relations between adults, and improper business competition in our definition of crime, even when they are not punishable in a certain country or at a given time. Probably the layman will think: why make all this fuss about a definition of crime? Every one of us knows what a crime is. Crime is murder, theft, burglary, swindling, fire-raising, rape, etc. But it is not about the centre of the country of the criminologist that there exists any doubt; the difficulties arise when we come near the frontiers. It is there that the legislator as well as the judge has to decide whether a certain act ought to be considered as a crime. The question is in the first place an important one for the legislator. It is self-evident that the lawgiver cannot define crime as an act punishable by law, for the moment he has to decide whether in future a certain act will be considered as a crime, the law is not yet there. So he cannot find his test in the law. Otherwise there never would be a new criminal law. For instance, at this moment hotel-swindling (*i.e.*, obtaining a room in a hotel while one is unable to pay for it) is not punishable in the Netherlands. In Belgium it is a " délit ", called grivèlerie, art. 508bis C.P.B. On the other hand we have in Holland a crime, under the name flessentrekkerij (French carambouillage), which consists in making a custom or a profession of buying goods with the intention to obtain them without paying for them (art. 326a N.P.C.). Both crimes are on the borderline between punishable and non-punishable acts, not only on the Continent but also in the United Kingdom, as far as I know. At least in Kenny, *Outlines of Criminal Law* (ed. 1933, p. 250) we read: " So, again, if what was obtained by the false pretence were not a thing at all, but only the enjoyment of lodgings or an act of service, the offence is not committed; as where a man secures a ride in a train by saying 'I am a season-ticket holder' ". (It may however be noted that under the London Cab Act, 1896, it is a specific petty offence, punishable on summary conviction, to hire a cab *in London* with intent to avoid payment of the lawful fare.) It is laid down in *Macdonald on the Criminal Law of Scotland* (5th ed., at p. 56): " It is a crime to obtain goods or board and lodgings with the preconceived intention not to pay for them, although no false inducements have been held out, and obligations to pay have been granted ". Now, for the Benelux Union, we are considering unifying our Statutes on this sort of crime. What must the lawgiver do to decide whether he has to make such acts a crime or at least an offence? He has to weigh in one scale of his balance the unrest and the annoyance caused by the fact that these matters go unpunished and in the other scale all the unrest and sorrow caused by the punishment. For each time the lawgiver makes a certain fact a punishable crime or offence, he enlarges in a certain way the unrest and sorrow in society. He widens the field in which blackmail is possible. This we see quite clearly in the cases of crimes against sex-morals. When, for instance, in England on January 1, 1886, section 11 of the Criminal Law Amendment Act, 1885, came into force, creating the new offence of indecency between male persons in public or private "a learned Recorder dubbed it 'The Blackmailer's Charter' and an eminent Q.C. prophesied that juries would refuse to convict where the alleged acts were in private and not visible to any member of the public".[5] But it is not only that the legislator when creating a new crime or offence gives further scope for blackmailers; he puts a new burden on the police and on the judicial administration too, and—last not least—the penalties cause to suffer, not only the author of the crime, but his family, relations, friends and employer. The conscientious legislator has to reckon with all these factors, and when creating a new offence he is obliged to weigh all these drawbacks against the indignation and unrest that would originate from not making a certain act punishable. It is for this reason that the criminologist has to study these what may be called para-criminal phenomena, these immoral acts that once have been crimes or that in future may become such.

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[1] Being an Inaugural Lecture delivered as guest Professor at the University of Aberdeen on Thursday, January 18, 1951.

[2] Thorsten Sellin, 5ème Rapport Général du 2ème Congrès International de Criminologie, Paris, 1950.

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[3] See the literature in J. Makarewicz, *Einführung in die Philosophie des Strafrechts*, Stuttgart, 1906, p. 50.

[4] This definition has a great resemblance to that of Makarewicz (l.c. p. 79): A crime is the act of a member of a certain social group which is considered by the other members as so harmful or in such a degree showing an anti-social mind of the offender that the group tries publicly, outwardly and jointly to abridge him in his rights and goods.

And now the judge. Does he have the same task as the legislator when he has to define whether a certain act is a crime or an offence? Nearly everywhere in the world we find the rule: *Nullum crimen nulla poena sine praevia lege poenali.* There is no crime and no punishment without a law. In most countries on the Continent this rule is

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[5] "The Trials of Oscar Wilde," ed. by H. Montgomery Hyde, *Notable British Trials*, (1948). Foreword by the Rt. Hon. Sir Travers Humphreys, p. 6.

expressis verbis mentioned in the Penal Code. This rule finds its origin in the Magna Charta of 1215 and from there it finds its way to the Habeas Corpus Act of 1679, and via Blackstone and Locke to the Bill of Rights of Virginia. From America it was brought by Lafayette to France, where it was incorporated in art. 8 of the Declaration of Rights of Man and the Citizen, and it emanated from there in the different Penal Codes of France and other European countries.[6] For the Continental jurist it is a cause for wonder and astonishment that in England "this rule will not be found in any Code or law of the Constitution, and that it is only a rule of Common Law of which the observance is secured in two ways; by redress for unlawful arrest or imprisonment by means of a prosecution or action, and by deliverance from unlawful imprisonment by means of the writ of habeas corpus".[7] The late Dr. Stallybrass quoted in this connection Professor Dicey who wrote: "There is no difficulty, and there is often very little gain, in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The Habeas Corpus Acts have achieved this end, and have therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights". Stallybrass adds: "It is perhaps legitimate for an Englishman to doubt whether the provisions in articles 613 to 617 of the Progetto Definitivo di un nuovo Codice Penale, taken from the present Italian Penal Code, for the punishment of those who are guilty of illegal arrest or imprisonment are as effective in securing personal freedom as the remedial procedure provided in England by the Habeas Corpus Acts". In Scotland the Habeas Corpus Acts do not apply. Illegal detention without a warrant is ground for petitioning the nobile officium of the High Court of Justiciary for liberation. The validity of a warrant may also be challenged by Bill of Suspension and Liberation. These remedies are independent of the provisions in the Criminal Procedure (Scotland) Act, 1887, for preventing delay in bringing to trial, and are independent also of the civil remedy of an action for damages. On the other hand the Continental jurist would not like to forgo the prescript incorporated in the rule of law "no crime without a law", because it makes it impossible for the judge and for the prosecutor to prosecute an act as punishable without a law. At the same time the police find their limitations in the Criminal Code and laws.

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[6] Vide Schottlaender, Strafr.Abh. 132.

[7] W.T.S. Stallybrass, A comparison of the general principles of Criminal Law in England with the *Progetto Definitivo di un nuovo Codice Penale* of Alfredo Rocco; *The Modern Approach to Criminal Law*, Ch. XX, p. 393.

So we see that the judge cannot make new crimes, and he can satisfy himself with the definition of crime as an act forbidden and punished by the law. But even for the judge this is not wholly true. He cannot consider an act as a crime without founding his decision on a law, but another question is—how is he to come to a decision when an act fully answers the definition of crime in the law, but is justified or excused by certain circumstances? Then arises for him the same difficulty which exists for the legislator. Now he has to draw the boundary. Self-defence, for example, may be a justification in the case of homicide if the defender has a reasonable apprehension of danger, and adopts none but proportionate means of warding it off.[8]

Continental penal codes mention *expressis verbis* many more of these grounds for the exclusion of liability, for example, the plea of superior orders, prescription of the law, and what is called in English "civil necessity", and what the Germans mean by "Notstand". In the Dutch Penal Code you will find these grounds for the exclusion of liability. They either justify the criminal act or they give a ground for excuse. Another of these grounds for excuse in Continental law is insanity. Now the legislator may mention these justifying and excusing grounds, but it is up to the judge to give them their real meaning and scope. On the Continent, as in the United Kingdom, the judge has to appreciate whether in a certain case they are valid or not. The plea of superior orders you know in your country as well as we in ours. Stallybrass in his article mentioned above says: "Probably the English law was correctly laid down by Solomon, J., in South Africa: 'If a soldier honestly believes he is doing his duty in obeying, and if the orders are not so manifestly illegal that he ought to have known they were unlawful, he will be protected by the orders' ". In Scotland, the law as stated by *Macdonald* (5th ed., at p. 105) is "Soldiers and sailors on duty are exempt from blame if they kill in obedience to orders from an officer or magistrate, except in case of flagrant illegality". I think that our law expresses itself somewhat more clearly, when it says: "No person is punishable who commits an act in the execution of an order given by an official who was entitled to give this order. An order which the official was not entitled to give does not exclude the liability unless the subordinate honestly believed the order to be rightly given and the following of the order lay in the field of his subordination".

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[8] Kenny, *Outlines*, (1933), p. 104. *Owens* v. *H.M. Advocate*, 1946 J.C. 119.

It would be very interesting to make here a full comparison of British and Continental jurisprudence about these grounds for non-liability, especially in the case of the plea of superior orders. This subject has become very important because the Charter of London of 1945 abrogated it in the cases of war crimes. In my opinion it was wholly unnecessary, and even wrong to do so, because either the order was executed by a soldier or a regimental officer, and in most cases they were not able to judge during the war whether an order was rightly given; or the order was executed by a commanding general, and they had in each case the obligation to test an order on the question whether the order was justified in the light of international law. In the Netherlands the abrogation of the plea of superior orders was not taken over by the legislator in the case of minor war crimes. But I cannot expatiate on this subject. I have only brought it up to show that the judge has to define crime from the negative side. He has to decide whether an act, wholly coming up to all requirements of a crime, is punishable or not. Even on the Continent the judge is not bound by the law in its enumeration of the causes for non-liability. Other causes than those named by the law may be recognized as such for example, sometimes consent of the victim or professional duty, and in general when a man has done what might be expected from him. In Germany and in my country we say that in these cases the material unlawfulness (materielle Rechtswidrigkeit) is lacking. So in these cases sometimes the judge can take the law as the source for his definition of crime, sometimes he has to look outside the law. Then—like the legislator—he has to weigh in his balance on the one side the moral and material interests damaged by the act, and on the other the moral and material rights which the author of the offence protected. The moralist and economist are the only men who can assist the jurist in his decisions. Further, in the cases of irresponsibility and diminished responsibility, the judge has to ask the psychiatrist and the psychologist. But yet, in the last resort, it is the jurist who has to decide about the validity of these grounds for non-liability, in so far as he has to weigh everything and all the causes. One might say he is the criminologist καγ' ἐξοχην, in so far as he has the last word about all the motives for the crime. He must be wiser than all the experts who deliver their opinion. The judge when he decides that a homicide, or a theft, or any other act, though to the letter answering the description of a crime, is not punishable, he is doing the work of the criminologist in practice. He must take fully into account everything he knows about the motives of men, he must know what the sociologist, the biologist, the psychiatrist, the psychologist and the moralist teaches about these motives, and then he decides like a true king what weight is to be given to them. It is for this reason I cannot agree with Thorsten Sellin, when he calls the criminologist a king without a country. On the contrary, the criminologist is more a king in his own right than most scientists, for in the end he has greater power than any of them, and he is obliged to be wiser than all of them. But then it is clear that the judge in criminal affairs has to study psychiatry, psychology, ethics, sociology, economy, political science, etc., etc. It is certain that the university at this moment does not prepare adequately those who in future are to become criminal jurists and criminologists.

There is still another reason why the criminologist may be called a king without a country. Every king has to know the rules and laws prevailing in his territory. For the scientist these laws are the rules about the causes for the phenomena in his field. Now criminology is a very young science and there is not much that is really beyond doubt. But still there are certain facts we know for certain, and which provide us with the materials for universal rules. Everywhere men are more criminal than women; young men between eighteen and twenty-five commit more crimes than older men.[9] The criminality of towns is more serious and extensive than that of the country,[10] the defective family shows more delinquent children than the households where the parents live in harmony. There certainly is a correlation between the business cycle and economic crime, and, at the same time, we see aggressive crime shows a neat contrast to economic delinquency. Migration has a correlation with crime. Especially, it is migration to towns which makes the immigrants more subject to criminal influences than the original inhabitants of the towns. All these facts were found statistically. But what is the use of this knowledge? When I ask this, I do not mean how far do these facts, the number of which can easily be extended, enable us to combat and restrain crime, but whether they give us an insight into the real causes of crime. The same question arises when we look for the facts made clear to us by psychology and psychopathology. We know that there are psychological types which are more inclined to delinquency than others. We know that the unconscious mind may motivate criminal actions. We are able to say that the neurotic type and the criminal type are the counterparts of each other in so far as, *e.g.*, the unconscious factors that produce an over-strong superego may lead in addition either to neurosis or to crime; on the other hand, it is possible that the same complexes cause a lacking superego and in this way a tendency to crime. Those types which combine a lack of activity with little repercussion or after-reaction (nachwirkung) of impressions (and so have a weak secondary function of the unconscious) certainly are more inclined to criminality than those which are at the same time more active and show more after-reactions of the unconscious. Here too we may ask: What is the use of such knowledge?

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[9] See for Scotland Table 8, *Criminal Statistics Scotland*, 1949. Edinburgh. 1950.
[10] See Table 7, *Criminal Statistics Scotland*.

In my opinion these facts lead us to one universal law in the field of criminology, which says: Every time a man is in a position in which either by contrast or by conflict with others his desires (his libido in the larger sense of the word) are greater than his potentiality to satisfy them, the tendency to crime is enlarged. Naturally this is a platitude and extremely commonplace, but then many truths are truisms. In each case this universal law builds a bridge between the sociological and the psychological part of criminology, for each time society creates a new cause for differences in the libido and potentiality for its satisfaction among men, it enlarges the possibility of delinquency; and each time a man shows a defect in his capabilities compared with other men, while at the same time his desires, longings and wants are on the same level, he has a greater chance than those others of becoming a criminal. So there are thousands of causes of crime, but they all find their foundation in the universal law stated above, which we called a truism, but which at the same time gives us a key to all facts in criminology. It has some resemblance to the law of gravitation, which is at the root of so many physical facts. This universal law explains, for example, why men between eighteen and twenty-five are in their most criminal age. During that time they have all the desires of the grown-up man, but the means to satisfy them are in many cases absolutely insufficient. They cannot yet marry, they often have work that for a young man is unattractive, etc., etc. In the same way we can understand why men are so much more criminal than women. Young women, especially between eighteen and twenty-five, have much more opportunity to satisfy their desires than young men of that age. Their chances of marrying at this age are much greater than at any other age. In each 1,000 men in Holland married in 1942, 302 were under the age of twenty-five years, whereas in each 1,000 women there were 457 under that age. From research which Miss Johanna Hudig[11] has made in my country, especially in Utrecht, it becomes clear that this fact of the younger age of marriage of women protects them more or less against becoming criminal in regard to economic crimes. On the other hand, married women aged less than thirty commit more aggressive crimes than the unmarried women under thirty. This last fact we can explain in the same way. The married woman has to protect and to maintain, not only herself, but her husband and children against the offences of others. But the principal reason why men are more criminal than women probably is that women have a greater adaptability to the exigencies of their surroundings; and this perhaps may be attributed to another fact, namely that women show less variation than men. There are twice as many boys with mental debility as there are girls. On the other hand there are far fewer women than men who show real genius. The variability of women is less than that of men.[12] On the other hand, women on average show a higher emotionality than men. This, too, protects them more or less against crime, with the exception of crimes that have a pronounced correlation with emotionality as, *e.g.*, murder by poison. Women have on average somewhat more activity. So we may come to the conclusion that the difference between libido and the means to satisfy it is greater for men than for women. In the same way it is possible to prove that the greater criminality of immigrants, the greater criminality in towns and many other facts in criminology are founded on this same fundamental law. The criminologist, therefore, is able to explain the facts he finds in his field, and to reduce them to some fundamental laws, in exactly the same way as is found in other sciences.

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[11] Johanna C. Hudig, *De criminaliteit der vrouw*, pp. 44–47. Hans Krille, *Weibliche Kriminalität und Ehe*, Krim.Abh.XVI, p. 48, came to the same conclusion.

[12] G. Heymans, *Die Psychologie der Frauen*, *Heidelberg*, 1910, S. 307.

And now a last question. In other parts of science, man tries to make practical use of his inventions and results. The economist, the mathematician, the chemist, etc., everyone of them tries to apply his findings in practical life. This application of science is not usually considered as a part of science itself. We distinguish between theoretical economy and economic policy, and between the theory of physics and its application. Still, it is very important that we should be able to apply our knowledge and findings. What use can we make of the conclusions to which the criminologist comes? When we put this question, we must again keep in mind the fact that criminology is a very young category of science; and that, like economics, it is concerned with the activity of men, where we cannot make use freely of experiments. Therefore we must not be astonished that the practical results of criminology up till now are very modest and limited. But, notwithstanding that, even at this moment criminology has had some influence on the practice of criminal law. The change in attitude towards juvenile delinquency, and towards the criminality of psychopaths, certainly has been partly due to the new ideas which the criminologist has propagated.

In the same way we will in future devote more attention to the criminality of the people between eighteen and twenty-five, because this age-group stands apart from the others.

But there are many facts the criminologist has detected which up till now cannot be put to practical use. The guest

Professor we have at this moment in Leiden, Dr. Frank Leroy Kidner, Professor at the University of California, said in his inaugural address[13] that he thought no intellectual discipline other than Economics enjoys the dubious distinction of being known as the " dismal science ", and that the professors in economy were the " dismal professors of a dismal science ". I am certain that criminology and the criminologists share this distinction with the economists. For, just like the economists, we are well aware of many methods by which to improve society and to lessen and to avoid crime. If there were fewer frontiers, fewer boundaries, fewer " culture conflicts ", there certainly would be less crime. If it is really true that crime is a result of a disproportion between wants and the possibility of fulfilling those wants, society certainly has an obligation to avoid actions which would increase such a disproportion. Just to give an example. We know that great general stores are much more exposed to theft than little shops. This is easily explainable, because in these general stores, where all sorts of desirable goods in great quantities are displayed, all persons who come there realize automatically that they not only want a certain thing that they came to buy, but lots of other articles, too. So, their wants and longings are suddenly enlarged and intensified; the legal potentiality to realize them has remained the same. They do not suddenly find more money in their purse. No wonder that these general stores must have their own detectives to combat theft. The same is the case with great open markets.

Naturally it is impossible to say that there must not therefore be general stores and markets. But we must always keep in mind that part of the thefts in these great stores can be avoided by making it less easy to steal there. In the police court in The Hague I was often indignant that in some of the great clothing stores women were allowed to take the dresses themselves out of the rows where they were hanging, and to try them on in the trying-on rooms without anybody taking any notice of them. The natural result was that, when I functioned before the last war once every two weeks as one of the police judges at The Hague, there continually appeared before me one or two miserable women who had pulled on a dress under her own dress and who had tried to get away with it. Society has certainly a moral duty not to create unnecessary opportunities for crime. This, for instance, is most true in regard to unemployment. We know for certain that unemployment has a most disastrous influence on the unemployed themselves and on their sons. Long unemployment in particular has very bad consequences, which it is impossible to check even with assistance and relief. Already in 1935 Bessie A. McClenahan[14] wrote about these bad influences of prolonged unemployment and assistance on the unemployed themselves and on their children, who in the end expect to get everything for nothing, and at last come very easily to crime. At about the same time in Holland, Mrs. Everts-Goddard came to the same conclusion.[15] Apart from the fact that every man has a right to work, unemployment must be avoided for criminological reasons.

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[13] Frank Leroy Kidner, *Full Employment and Economic Policy*, inaugural address, Leiden, November 17, 1950.

It would be easy to continue this list of examples where society itself is to be blamed for widening the gap between wants and the ability to satisfy them. During the lectures I hope to give at this university, I will have ample opportunity to indicate and to discuss them at length. On the other hand, it is quite certain that, even if society did its utmost to fill up these gaps, there still always would be crime, for there would be so many differences in intellect and gifts, in temperament and character, between men that jealousy, discontent and inferiority feelings never would disappear, and these sentiments would at all times cause crime. But the great advantage in a society that did not itself aggravate these causes and opportunities for crime would be that the conscience of that society might be more at ease in punishing or treating the real criminals. But it is to be feared that the selfishness of man in general, and especially the probable recurrence of wars for many centuries, will make it impossible to create a society that itself does not furnish strong incentives for delinquency. But as Walter Bromberg[16] says: "Science has exerted the strongest and most persistent influence on man's eternal struggle against the destructive forces within himself. Objective science has been a strong ally in criminology as in other fields where prejudice and ingrained emotional bias must be fought to achieve betterment in human institutions".

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[14] Bessie A. McClenahan. *Child of the Relief Agency: Social Forces*, May, 1935, p. 566, as quoted in Donald R. Taft, *Criminology*, 1950.

[15] J. E. Everts-Goddard, *Unemployment and Youth-Criminality* (in Dutch) *Tijdschrift voor Strafrecht*, XLVII, p. 302.

Let us hope that science, and especially criminology, in the end will make it so clear to everybody in the world that aggressive war is the greatest crime man can commit that this major cause of other crimes will no more occur.

J. M. van Bemmelen.

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[16] Walter Bromberg, *Crime and the Mind*, 1948, p. 13.

ALTERNATIVE ACTIONABILITY IN THE CONFLICT OF LAWS OF ENTERPRISE LIABILITY

An American Comment on M'Elroy's Case

THERE is probably no other country which has succeeded as well as Scotland in combining a maximum of the virtues of the common and civil law with a minimum of their vices; no other country where the growth of the common law by judicial fiat has been as soundly supported by the accumulated wisdom of two thousand years of civil law scholarship.[1] Any student of comparative law, therefore, will follow the development of Scottish law with the greatest interest and be an ardent reader of Scottish law journals. In the field of private international law American lawyers have a particular reason to study the law of Scotland carefully. In this field, American Courts and legal scholars have always drawn heavily on Scots sources. Indeed, Judge Story himself, whose great treatise has in turn been given much attention in English-speaking countries including Scotland,[2] traces many of his precepts to such Scottish standard works as Erskine's *Institutes*.[3] In view of the intimate relationship between the conflicts laws of Scotland, the Continent and the United States, a brief comment by an American law teacher previously trained in the civil law, on a significant development in Scots law may not be out of order.

In a recent issue of the *Scots Law Times*, Mr. David M. Walker, after an excellent survey of the development of the Scottish conflicts law of delicts, commends the recent case of *M‘Elroy* v. *M‘Allister*[4] as embodying “a sound principle by which the actionability in the Scottish Courts of a delictual act or omission committed furth of Scotland may be tested, a principle logically developed from and in conformity with the prior Scottish authorities and with the views expressed in the most influential juristic writings ”.[5] In that case an action by a Scots resident whose husband had died in consequence of a traffic accident in England, for solatium under Scots law and damages under the English Fatal Accidents Acts as well as under the Law Reform Act, 1934, was dismissed (1) as to the first two counts as not actionable under the *lex loci*, and (2) as to the last count as not actionable under the *lex fori*. It is as to the first ground that Mr. Walker commends the decision as “affirming beyond question . . . the rule of concurrent actionability, to which Scottish Courts have long been tending ”,[6] in contrast to the prevailing English rule[7] which is satisfied with actionability under the *lex fori*.

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[1] See, *e.g.*, Gardner, *Judicial Precedent in Scots Law* (Edinburgh 1936) 11.

[2] See, *e.g.*, the references to *Story* by Shand, Lord Ordinary, in *Goodman* v. *London and North-Western Ry.*, 1877, 14 S.L.R. 449, 451, 452.

[3] See the first edition (1834) of *Story's Commentaries on the Conflict of Laws*, list of authors cited.

By adopting the rule of concurrent actionability the Court of Seven Judges in *M‘Elroy’s Case*, adhering to the rule announced in the *Naftalin Case*,[8] approached a result similar to that of the American rule under which the defender will always be dealt with under the law of the “place of wrong ”,[9] in the absence of a strong policy of the forum to the contrary. Both rules seem indeed preferable to the English rule if and where delictual liability continues to serve, primarily at least, the punishment of a "wrongdoer". For, in the words of Mr. Justice Holmes, in such cases "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts . . . would be unjust".[10]

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[4] *M‘Elroy* v. *M‘Allister*, 1949 S.L.T. 139. See comments by Morris, 12 M.L.R. 248 (1949); Gow, 65 L.Q.R. 313 (1949); Schmitthoff, “Torts Committed Abroad ”, 27 Can.Bar Rev. 816 (1949); Rankin, 61 Juridical Review 81 (1949). See also 8 Encyclopedia of the Laws of Scotland (1939) P. 394.

[5] Walker, “Delicts and Conflict of Laws ”, 1950 S.L.T. (News) 209.

[6] Walker, *supra*, note 5, at 209. No attempt is made in this paper to analyze complaint and decision under either Scottish or English municipal law. See comments, *supra*, note 4.

[7] *Infra*, note 13. But see the *dictum* by Brett, L.J., in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, 537.

[8] *Naftalin* v. *London, Midland and Scottish Ry.*, 1933 S.L.T. 193. Cf. O’Riordan, “Choice of Law in Actions ex Delicto under Scots Law ”, 4 M.L.R. 214 (1941).

[9] In the very cases which presented the earliest and most difficult conflict problems, the place of wrong rule had to overcome dogmatic opposition to the “extra-territorial ” application of foreign statutes [cf. *Beach* v. *Bay State Steamboat Co.*, 30 Barb. 433, 434 (New York 1859)] which in *Story's Commentaries* (1834, p. 7) is traced back, through Boullenois, to the rule of the Digest according to which one may with impunity disregard the law pronounced by a magistrate beyond his territory. Dig. 2, 1, 1, 20. As late as 1875, the Supreme Court of Wisconsin felt able to call the principle that a personal injury action is governed

It is respectfully suggested, however, that the rule of concurrent actionability, now confirmed in *M'Elroy's Case*, should perhaps not be extended to those delictual liabilities which, far from aiming at the punishment of "wrongs", have come primarily to serve the distribution of unavoidable risks of modern mechanical enterprise, with little or no regard to the defender's conduct.[11] If it can be established that, indeed, the great majority of the Scottish cases, so

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by the *lex fori*, "almost too familiar . . . for discussion or authority". *Anderson* v. *Milwaukee & St. Paul R.R.*, 37 Wisconsin 113, 85 North Western 707 (1901). But the "extraterritoriality" approach was soon abandoned as "indefensible" [Minor, *Conflict of Laws* (1901) 492] and the place of wrong rule now seems firmly established in the United States. See American Law Institute, Restatement, Conflict of Laws (1934), §§ 378, 379, 384. Regarding the laws prevailing in other countries, see 2 Rabel, *Conflict of Laws: A Comparative Study* [1947] 244.

[10] *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 Sup.Ct. 511 (1909). See the similar reasoning by Lord Shand in the *Goodman Case*, *supra*, note 2, at 451.

[11] In my forthcoming book on *Negligence without Fault*, I have attempted to trace the growth of this division of the law of torts from an early law of tort-crimes; through the development of an independent tort law moralizing and moralized by, "its younger brother, criminal law"; to a modern law of loss distribution with little or no regard for the actor's motivation. This theory was developed in the writer's note, "Loss-Shifting and Quasi-Negligence: A New Interpretation of the *Palsgraf Case*", 8 University of Chicago Law Review 729 (1941); in the writer's study prepared for the Law Revision Commission of the State of New York, on "Products Liability for Breach of Warranty and Negligence", Leg. Doc. No. 65 (J.) (1943); as well as in "Assurance Oblige—A Comparative Study", 15 Law and Contemporary Problems 445 (1950), a paper delivered at the Third International Congress of Comparative Law, London, 1950. See also the writer's "Schuldhaftung im Schadenersatzrecht" (Vienna, 1931); "Zur Erneuerung des Schadenersatzrechtes" (Vienna, 1937); "Versicherung als Haftungsgrund", 72 Juristische Blaetter 253 (Vienna, 1950); and "El Seguro Obliga", 3 Boletin del Instituto de Derecho Comparado de Mexico 3 (1950).

ably presented by Mr. Walker as supporting *M'Elroy's* rule, are cases involving intentional wrongs—where actionability at the place of acting is clearly required by demands of fairness to the defender—much will be gained for the present thesis.

Omitting *Goodman* v. *London & North-Eastern Ry.*[12] as based on an erroneous application of *Phillips* v. *Eyre*[13] rather than a new Scots doctrine, and further omitting at this point *Horn* v. *North British Ry.*[14] as based on the distinction between remedy and substance,[15] we must consider *Rosses* v. *Bhagvat Sinhjee*[16] as the first decision supporting the principle of concurrent actionability. That case, decided in 1891, involved the intentional delict of seduction, and held for the defender because the acts complained of had been committed in England where they were not actionable; Lord Trayner stating that if an act "is not a wrong . . . by the law of England, it can never become a wrong from the fact that the doer of it has since come to Scotland".[17] This approach was confirmed in 1904 in *Evans* v. *Stein*[18] which, concerning slander, another intentional tort, was decided against the pursuer on the same grounds. While six years later, the Outer House, in *Thomson* v. *Kindell*,[19] held for the pursuer in an action for slander alleged to have been committed in England where it was not actionable, it left unaffected the Scottish *lex loci* rule, having found the tort to have been completed in

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[12] *Supra*, note 2.

[13] *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1. Cf. the similar reasoning by Lord Keith in his dissent in *M'Elroy's Case*, *supra*, note 4, at 147. As to the meaning of the English rule, see *e.g.*, Falconbridge, *Conflict of Laws* (1947) 15; Hancock, *Torts in the Conflict of Laws* (1942) 12 *et seq.*

[14] *Horn* v. *North British Ry.*, 1878, 5 R. 1055.

[15] *Supra*, note 14, at 1064.

[16] *Rosses* v. *Bhagvat Sinhjee*, 1891, 19 R. 31.

[17] *Supra*, note 16, at 38. Similar language had been used by Lord Shand in the *Goodman Case*, *supra*, note 2, at 451.

[18] *Evans* v. *Stein*, 1904, 7 F. 65. This decision, however, failed to overrule *M'Larty* v. *Steele*, 1881, 8 R. 435. In that case the Lord Justice-Clerk, who a first seemed to incline to the English rule, ultimately adhered to the opinion of his colleagues favouring the *lex fori* (437).

[19] *Thomson* v. *Kindell*, 1910, 2 S.L.T. 442.

Scotland. And again, in *Soutar* v. *Peters*,[20] in 1912, the same Court, while for the same reason allowing proof for the pursuer in a seduction case, failed to overrule Lord Trayner's actionability rule. All these cases, then, concerned intentional torts as to which a conflicts rule permitting the defender to invoke the more lenient law of the place of his acting is clearly as justified as in the law of crimes.[21]

But, we may ask, should this rule, which serves the defender's protection against unfair blame for fault, be automatically applied to that modern class of delicts where Courts, while continuing to talk in terms of fault, are often in effect seeking a reasonable distribution of the risks created by the hazards of modern enterprise with little concern with the defender's behaviour? True, in a suit for damages against railroads and similar dangerous enterprises for harm caused in the course of their activities, Courts, in the absence of a statute imposing strict liability, will still purport to make liability depend exclusively on the establishment of some fault somewhere along the line in the chain of causation. But we all know that the doctrines of *respondeat superior* and *res ipsa loquitur*, particularly since the advent and tremendous spread of liability insurance,[22] have often assisted Courts and juries in imposing liability on entrepreneurs when such imposition has seemed economically equitable and desirable. The need in such cases for a new conflicts rule independent from quasi-criminal policies governing intentional delicts seems obvious.

It may well be that unconscious recognition of the growth of a prevailingly non-admonitory tort law has substantially contributed to the substitution, in the Restatement of Conflict of Laws by the American Law Institute, for the plain place of wrong rule of what has become known as the " place of harm " rule,[23] under which a defender may be held without regard to the law prevailing at the place of his act. Where a food manufacturer produced in, and shipped from, New York food which poisoned a purchaser in Ohio, the latter's claim for reparation was under this rule governed by Ohio law as that of the place of harm rather than by that of New York under which the defender had acted.[24] Professor Cheshire would prefer this rule to the English place of conduct rule apparently underlying *George Monro, Ltd.* v. *American Cyanamid and Chemical Corp.*[25] While the place of harm rule is subject, and has been subjected, to much criticism,[26] it contains, it is submitted, the roots of a rationale which may well lead the way to a new conflicts rule to govern enterprise liability.

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[20] *Soutar* v. *Peters*, 1912, 1 S.L.T. 111.

[21] See, *e.g.*, *Kaims on Equity*, B. 3, ch. 8, § 1, cited by Story, *supra*, note 3, at 518, as stating the doctrine in Scotland.

[22] *Supra*, note 11.

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[23] The Restatement itself, in section 377, prefers to talk in terms of the " State where the last event necessary to make an actor liable for an alleged tort takes place ". Analysis shows the circuity of this definition which, in referring to the actor's liability, presupposes the ascertainment of the very law the conflicts rule is designed to identify.

[24] *Hunter* v. *Derby Foods*, 110 Federal (2d) 970 (Second Circuit, 1940). Accord *Reed & Barton Corp.* v. *Maas*, 73 Federal (2d) 359, 361 (First Circuit, 1934) (coffee urn negligently constructed in Massachusetts, injury in Wisconsin); *McGrath* v. *Helena Rubinstein, Inc.*, 29 Federal Supplement 822, 823 (cosmetics shipped to Pennsylvania); *Openbrier* v. *General Mills*, 340 Pennsylvania 167, 16 Atlantic (2d) 379 (1940) (bread shipped from New York to Pennsylvania); *Mannsz* v. *Macwhyte Co.*, 155 Federal (2d) 445 (Third Circuit, 1946) (Illinois manufacturers' " negligence " liability for defective rope breaking and injuring the pursuer in Pennsylvania).

[25] *George Monro, Ltd.* v. *American Cyanamid and Chemical Corp.*, [1944] 1 K.B. 432. Cf. Cheshire, *Private International Law* (3rd ed., 1947) 383; Dicey's *Conflict of Laws* (6th ed., 1949) 803.

[26] At the time of its adoption the rule was certainly not supported by authority. Rheinstein, " The Place of Wrong: A Study in the Method of Case Law ", 19 Tulane L.R. 4, 165 (1944). The rule is clearly based on the " vested rights " theory, mercilessly, and we hope definitively, defeated by Professor W. W. Cook in his classic book on the *Logical and Legal Bases of the Conflict of Laws* (1942). Moreover, the place of conduct rule has been partly maintained in admiralty actions [*Robinson on Admiralty* (1939) 90] as well as in determining the place of the breach of a contract [cf. *Louis-Dreyfus* v. *Paterson Steamships, Ltd.*, 43 Federal (2d) 824, 826 (Second Circuit, 1930)], and, at least in terms, in the Federal Tort Claims Act. Finally, the Restatement itself, by permitting the defence of " privilege " (section 382) and measuring the " standard of care " (section 380) under the law of the place of acting, has itself proved conscious of the shortcomings of the place of harm rule in its purported generality. In a highly significant recent decision the Federal District Court of Massachusetts has repudiated the place of harm rule in a case involving the intentional tort of alienation of affections. *Gordon* v. *Parker*, 83 Federal Supplement 40 (Massachusetts, 1949), affirmed on other grounds, 178 Federal (2d) 888 (First Circuit, 1949).

When the Rosses sought reparation for seduction from Bhagvat, the Scottish Court could very well forego the defender's punishment for an act which, though actionable under the law of Scotland, was not so actionable under the law of England under which he had acted. But should the Scottish Court refuse a Scots widow the right to compensation for her husband's death which had resulted from an accident in the course of a dangerous activity, against the consequences of which Scottish law had provided for this very compensation? Or should a Scottish Court deny recovery to a Scots resident who, poisoned by food manufactured in England, seeks reparation from the manufacturer, if it should find English law (similarly to New York law in the New York case) [27] to require a stricter proof of negligence than Scottish (Ohio) law? Laws which impose strict or quasi-strict liability on railroads or manufacturers for harm inevitably inflicted by them in the course of their dangerous activities are only incidentally designed to affect the defender's conduct whose activity as such is not only tolerated but even encouraged by the State. Such laws are primarily designed to protect domiciliaries of the State and the State itself against their impoverishment by harm inflicted by such entrepreneurs in the course of their profitable activity. In this sense the reparable harm is ultimately suffered at the place of the pursuer's domicile and the law of the place of this harm should reasonably govern the defender's liability without regard to the law prevailing at the place of his activity.[28] In this type of cases, it is submitted, in contrast to those of intentional delicts previously discussed, consideration for the victim clearly prevails over that for the actor, underlying the place of wrong rule. A railroad transporting Scottish passengers entitled to reparation under their law will not arrange its standard of care according to whether or not the law of Scotland will be applied to claims of such passengers hurt in one of the accidents typical for its activities. On the other hand, if railroad liability is properly understood as mainly serving risk distribution, there is no reason why railroads serving both English and Scots passengers should not calculate, for purposes of their liability or self-insurance, possible damages that they might become obliged to pay under Scots law, if subject to Scots jurisdiction. It is this consideration, it is submitted, which may furnish a functional rationale for those earlier decisions applying to accidents in England Scots law as that of the *lex contractus*. If this analysis is correct, the Court in *M‘Elroy’s Case* could perhaps have permitted recovery on the first two counts under Scots law, under the *Horn* rule, while maintaining and distinguishing the rule of the *Rosses Case* as limited to intentional delicts, following either the *lex fori* approach[29] or the place of harm doctrine of the American Restatement.

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[27] *Hunter* v. *Derby Foods*, *supra*, note 24.

[28] See Salonga, "Conflict of Laws: A Critical Survey of Doctrines and Practices and the Case for a Policy-Oriented Approach," 25 Philippine L.J. 527. 528 (1950). In "negligence" actions against air carriers there appears an additional important reason against the application of a rule referring to the place of acting. "The ice began to form on the wings over Pennsylvania; the wrong handle was pulled in the air over Maryland so that the de-icer broke down over West Virginia and the plane fell in Virginia". [Knauth, "Renvoi and other Conflicts Problems in Transportation Law", 49 Columbia L.R. 19 (1949).] Where did the wrongful act occur?

Adoption of a *lex fori* approach could not mean return to *Phillips* v. *Eyre* even as to enterprise liability. In the first place, the rationale of that liability, while supporting imposition of liability under the law of the forum in certain cases, would seem to preclude the application of that law in accordance with the decision on the third count in *M‘Elroy’s Case*, for the purpose of denying recovery. Rather, it is submitted, some consideration should perhaps be given to those authorities which advocate the pursuer's right to choose between the two laws,[30] or, in other words, to the possible adoption of a rule of *alternative actionability* in enterprise liability cases as distinguished from the *Rosses*' rule of concurrent actionability applicable to liabilities for fault.

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[29] Exclusive application of the *lex fori* is not unknown to Continental law. The French practice prohibiting *la recherche de la paternité* even as to children conceived in countries recognizing a tort of illicit intercourse, seems to have induced Savigny [*A Treatise on the Conflict of Laws* (transl. Guthrie, Edinburgh, 1869, 205] to postulate this rule. See also Waechter, *Archiv fuer die Civilistische Praxis* 25, 389; Wyss, *Zeitschrift fuer Schweizerisches Recht*, IV, 95; Mazeaud, *Revue Critique*, 1934, 377; Arminjon, *Précis de Droit International Privé*, II, No. 120 (1947); Battifol, *Droit International Privé*, No. 558 (1949). The same rule was the law of Greece until the recodification of 1946 [Article 6 of the Code of 1856] and the Soviet Supreme Court ruled in 1941 that "the law of the place of trial (*lex fori*) shall be applied". Nicoletopoulos, "Private International Law in the New Greek Civil Code", 23 Tulane L.R. 452, 470 (1949); Gsovski, *Soviet Civil Law* (1949), Vol. 2, at 14. See also *supra*, note 9.

Nor could the imposition of enterprise liability under the *lex fori* be justified by "the accidental circumstance of the defender's being or becoming liable to the jurisdiction".[31] Only where the pursuer is a resident of Scotland should the Scottish forum insist on applying its own law in enterprise liability cases, or, in other words where, to use the American formula in a new sense, the forum is also the place of harm.[32] But again the law of the pursuer's residence should not be applicable to defeat an enterprise liability claim, as was attempted in the case of *Convery* v. *Lanarkshire Tramways Co.*[33] For, while the policy of the Scots Court favours application to foreign accidents of its own law for the protection of its domiciliaries, no similar policy would permit protection of foreign domiciliaries against the application by Scots Courts of their own law.

Admittedly this is largely speculation *de lege ferenda*. But whatever the ultimate solution of these problems, this much seems clear today: In the most frequent, typical situation of a Scots domiciliary claiming the protection of a Scots Court under Scots law in an enterprise liability case, he should not be met with a defence under the *lex loci*, the application of which in such cases is in no way required by demands of fairness to the defender.

To sum up: it is respectfully suggested that, before the

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[30] See generally, *Rabel*, *op. cit.*, *supra*, note 9, at 304, 333; *Dicey*, *op. cit.*, *supra*, note 25, at 804; Wolff, *Private International Law* (1945) 501; and for advocates of the choice rule Lorenzen, *Selected Articles on the Conflict of Laws* (1947) 370; *Cook*, *op. cit.*, *supra*, note 26, at 319, 345. For an isolated American *dictum* to this effect, see *Chicago, St. Louis and New Orleans R.R.* v. *Doyle*, 60 Mississippi 977 (1883).

[31] *Goodman* v. *London and North-Western Ry.*, *supra*, note 2, at 451.

[32] Professor J. H. C. Morris, *supra*, note 4, at 251, advances "the heretical suggestion" that Scots law be applied "to a tort committed in England by one Scotsman against another".

[33] *Convery* v. *Lanarkshire Tramways Co.*, 1905, 13 S.L.T. 512.

House of Lords has occasion to speak the final word, the question be reconsidered whether the modern development of two types of delicts governed by the two essentially different policies of admonition and compensation would not justify the recognition in Scotland of two different conflicts rules in this field: (1) One applicable to intentional and possibly other admonitory delicts, which, in accordance with demands of fairness to the defender, following the *Rosses'* line of cases, would require concurrent actionability under the law of Scotland and the *lex loci*[34]; and (2) another rule applicable to enterprise liabilities which in accordance with demands of fairness to the Scottish victim of the hazards of modern mechanical enterprise, partly restoring the doctrine of the *Horn Case*, would require alternative actionability under either the *lex loci* or the law of Scotland as that of "the place of harm".

By refusing in *Rosses*, *Thomson* and *Soutar* to follow, as to intentional torts, either the English *lex fori* rule or the Continental or American variations of the *lex loci* rule, all of which fail to protect the innocent defender, and by establishing the rule of concurrent actionability in such cases, Scots law has rendered an important service to the development of Private International Law. It is submitted, however, that by an extension of this rule into the field of enterprise liability, to the detriment of those seeking distribution of risks rather than retribution of wrongs, this great achievement would be seriously jeopardized. By limiting this rule to admonitory delicts and advancing, as to enterprise liabilities, a distinct rule of *alternative*

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[34] For American applications of this rule, contrary to the purportedly general place of harm rule of the Restatement, see, for example, *Bradbury* v. *Central Vermont R.R.*, 299 Massachusetts 230, 233, 12 Northeastern (2d) 732, 734 (1938), (false representations in Vermont, harm in Ontario, Vermont law applied in fraud action); *Vacuum Oil Co.* v. *Eagle Oil Co. of New York*, 154 Federal 867 (New Jersey 1907) (unfair competition). Defamation and conversion cases are not conclusive, since the multifariousness of the former increasingly requires localization at a place not subject to the pursuer's arbitrary choice, and the close connection in the latter between act and situs has prompted Courts to choose that law as one most appropriate for "property torts". Cf. *Mattox* v. *News Syndicate Co.*, 176 Federal (2d) 897 (Second Circuit 1949) (libel); *United States* v. *Rogers & Rogers*, 30 Federal Supplement 79 (Minnesota 1941), appeal dismissed, 121 Federal (2d) 1019 (conversion).

actionability, Scots law, once again, could fulfil its unique mission as a mediator between the legal systems of our Western world, and give us " a picture of what will be some day . . . the law of civilized nations ".[35]

ALBERT A. EHRENZWEIG.[36]

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[35] Lévy-Ullmann, " The Law of Scotland ", 37 Juridical Review 370, 390 (1925).

[36] Professor T. B. Smith, Department of Law, University of Aberdeen, has offered much valuable guidance, and has contributed the following note:—

M'Elroy v. *M'Allister*, 1949 S.L.T. 139: 1949 S.C. 110, has been learnedly discussed from the point of view of Comparative and Private International Law by jurists of highest repute. The case has indeed become part of the international currency of important decisions. This reflection has prompted the writer to draw attention to two points of pleading which may help to a proper understanding of the case when considered outside Scotland. These points arose in correspondence between the distinguished American jurist, who is author of the foregoing article, and the writer of this note.

The case under discussion was decided upon relevancy, that is to say, that the pursuer had not made out a good case upon record. The rules of pleading in Scotland are designed to give fair warning to parties of the facts and law upon which their opponent relies. Accordingly, and it is submitted justly, a pursuer is not entitled to drag a defender through an expensive course of litigation, including a hearing of evidence, if he has not produced a clear and stateable case in law upon which he would be entitled to succeed if he proved the facts averred. In particular, if a pursuer relies upon foreign law he is rightly expected to state with some particularity what that law is and what its effects are. The pursuer in *M'Elroy's Case* failed to do this. There is apparent confusion by the pursuer's counsel regarding the English statute law. Condescendence 4 of the Summons asserts that the pursuer *qua* executrix claimed " damages under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the funeral expenses and the loss caused in the death of the said Joseph M'Elroy ". Since section 1 of that Act provides for the survivance for the benefit of the estate of causes of action vested in the deceased at the time of his death, clearly " loss caused in the death " cannot itself be recovered. The Summons possibly confuses claims under the 1934 Act with claims under Lord Campbell's Act and/or the Scottish common law claim for patrimonial loss in respect of the death of a close relative.

The second ground of the pursuer's claim—*i.e.*, the claim *qua* widow under Lord Campbell's Act—is also badly phrased. If a pursuer intends to rely upon English law in his claim upon a defender, surely the least he can do is to aver with all possible clarity what the law of England in the circumstances provides. It is by no means clear that claims under Lord Campbell's Act are of similar scope to the analogous Scottish remedy. With regard to Lord Campbell's Act, Professor Winfield has observed (*Winfield on Torts*, 4th ed., p. 199) the Act itself is remarkably reticent about what is recoverable. So loose, however, were the pursuer's averments of actionability under English law that they were found not to be relevant and therefore it was unnecessary to discuss the relation between the Scottish and the English remedies. As Lord Justice-Clerk (Thomson) said (p. 118): " Had there been a relevant averment of actionability under English law an interesting question would have arisen as to whether the pursuer was entitled to ask the Scots Court, as the Court entitled to deal with ' remedy ', immediately to proceed to assess damages on the same principle as it would assess damages in an ordinary action at the instance of a widow for patrimonial loss, or whether it was incumbent on the pursuer to aver and prove the character and scope of the rights conferred on her by English law on the basis of which the Scots Court would ultimately assess damages. As this question does not arise, I express no opinion on it ".

FIRST IMPRESSIONS OF AUSTRIAN LAW[1]

I

Constitutional Law

CONSTITUTIONAL law is perhaps the field in which the comparative lawyer is least expected to tread. Each State, it may be argued, is entitled, if not bound, to have an individual, nationalistic constitution, which expresses the historical and ideological characteristics of its people, owing nothing to a conscious study of foreign constitutions. Such, however, is very far from being the case. One has only to consider the large number of new countries outside Europe whose constitutions are modelled on that of the United Kingdom, to see the falsity of such a view.

The historical development of Austrian constitutional law is of considerable interest, as it demonstrates very clearly how the transition from Absolute Monarchy to Constitutional Institutions, from tyranny to democracy *and back again*, was carried out.

It would be inaccurate to describe the medieval condition of the Habsburg dominions (of which, of course, Austria represents only the German-speaking part) as one of absolute monarchy. It could be better described as Diarchy—the division of power being in this case, on the one hand in the Emperors, on the other in the " States ", consisting of representatives of the Church, the nobles, the cities, and the almost unique " free peasants " of the Tyrol. It was only during the reign of the great Empress Maria

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[1] The writer does not pretend to have made a detailed examination of Austrian law, but merely seeks to record some of the impressions left by attendance at a recent course on the " Outlines of Austrian Law " conducted by the Karl Franz Universität of Graz. This article owes much to the lectures of my friend Professor J. Mokre, Dr.Jur., Dr.Rer.Pol.(Graz), who has been kind enough to revise the MS.

Theresia (1740–1780) that the balancing power of the States was broken, and the era which ensued until the Revolution of 1848 was one of unmitigated, if on the whole enlightened, despotism.

To a Briton the ideas of Revolution and Unconstitutionality appear to be inseparable. And yet the Constitution—in the sense of a written document—obtained in 1848 must be recognized as constitutional. The absolute sovereignty of a despot, if it be truly absolute, must include the power to bind the future action of the Crown. There is no reason why it should be subject to the only limitation that our law recognizes on the sovereignty of the King in Parliament, that it cannot restrict its own future freedom of action in this way.

On April 24, 1848, the first Austrian Constitution—the "April" or "Pillerdorf" Constitution—was granted from above by the then Emperor, Ferdinand, who abdicated later the same year in favour of the great Franz Josef (1848–1916). It set up two legislative chambers, the consent of both of which was necessary before the Imperial Assent could be given to a Bill. The executive power of the Crown was to be exercised by means of Ministers responsible to Parliament. The source of these novelties is apparent at first glance. The April Constitution also contained a "Bill of Rights" after the pattern so common in continental constitutions. It is to be noted that a specially solemn procedure was laid down for the passing of amendments to the Constitution—contrary to the model at Westminster.

More significant than the actual Constitution granted in 1848 was that put forward by the new Parliament at Kremsier (Kroměříž) a few months later, but never agreed to by the Emperor. This proposed that the two houses should be continued, but on very different lines, the Upper House becoming in lieu of a Chamber of Magnates on the lines of the House of Lords, a federal body composed of representatives of the various composite *länder* of the

Empire.[2] Federalism was to be carried a stage further by the establishment of provincial diets with local autonomy in the various *länder*. Another important feature was the proposal for a special Imperial or Constitutional court to punish offences against constitutional rights, to decide on clashes of jurisdiction between the Imperial and *länder* legislatures, to examine the legality of official acts and to try the single criminal offence of conspiracy. For the origin of these ideas one must look somewhat farther afield than across the English Channel.

The story of subsequent constitutional developments under the Habsburgs is an unsettled one. The " March Constitution " of 1849, which gave effect to some of the Kremsier proposals, including the creation of autonomous diets in the *länder*, was found to be too revolutionary, and for about ten years from 1851 the old utter absolutism was unconstitutionally restored. First the "*October Diplom*" of 1860 and then the " *Februar Patent* " of 1861 (in part designed to give a special status to Hungary, the " problem child " of the monarchy) created a federal system of central Imperial and local *länder* legislatures. This was more fully developed in the Constitution of 1867, which recognized Hungary as a practically independent State, only bound to Austria by the person of the Emperor and the " Law of Common Affairs " : defence and foreign relations, with finance for these matters. The remainder of the Empire (officially, " the Kingdoms and Lands of the Austrian Crown "), was placed on a completely federal basis with the establishment of governments in the *länder* answerable to the Diets. Their " competences " and those of the Imperial (Federal) government were carefully defined, and a special Imperial constitutional court set up as forecast in 1848. A system of Administrative courts on the lines of those in France was also created. Much of this structure survived the downfall of the Empire and continues under the Republic.

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[2] It seems best to retain the German term, as " state " gives too wide and " province " too narrow a meaning. They were the various territories of the House of Habsburg:—Upper and Lower Austria, Hungary, Bohemia, Styria, Carinthia, Tyrol, Salzburg, Galicia, Croatia, etc. Also then Venice and Milan.

The defeat of the Central Powers in 1918 meant the collapse of the Dual Monarchy and the fragmentation of its territories. The German speaking *länder*, forbidden an *anschluss* with Germany by the Treaty of Saint-Germain, found themselves the small residuum of a very large State. The German deputies of the last imperial *reichsrat* met as a legislature for Austria (in the new, restricted sense) on October 21, 1918, and on the 30th declared themselves to be the " fundamental organ of the State ". This was in effect the foundation of a new State, although the word " republic " was not used as yet. The new structure was, however, strictly republican with a very keen emphasis upon the supremacy of Parliament. For example, there was to be no individual Head of State, the three presidents of the chambers forming the *staatsratdirecktorium* or collective head of the State. It was also highly centralized, the *länder* diets being abolished or at least suspended. On November 11, 1918, the last Emperor Karl gave a colour of legality to this arrangement by a formal surrender of his powers. This was followed by the solemn declaration of the republic on November 12. By the December Amendment of 1918 the former Imperial court was revived as the Constitutional court (*Verfassungsgerichtshof*).

Elections were held in February, 1919, on a proportional representation and " party list " system. Under this, which is still in use in Austria, there is no voting for individuals in constituencies, but only for the parties as a whole. The " March Amendment " of 1919, besides making changes in the central structure itself, revived the Federal conception and gave diets once more to the *länder* which remained.[3] The central government, however, retained a power of veto over their acts, and *länder* legislation, like that of the Federal Diet itself, was subject to the additional control of the Constitutional court on the grounds of unconstitutionality. This appears to have been done very much under the influence of Professor Kelsen.

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[3] Including Burgenland, which had formerly been part of Hungary. At the same time Vienna, whose citizens form over one quarter of the Austrian population, was given the status of a *land*, distinct from Lower Austria.

The final constitution of the new State was not agreed on until late in 1920. The governing principles of this may be summed up as three: (1) Democracy, (2) Federalism, (3) Parliamentary sovereignty.

This constitution contained a list of laws which were to be given a constitutional character, *e.g.*, the Bill of Rights from the 1867 Constitution, the protection of minorities laid down by the Treaty of Saint-Germain, and certain other safeguards, *e.g.*, a law prohibiting censorship of the press. In addition, there was a special clause (which represented one first given to the Imperial Government in 1917) giving the Executive power to legislate in certain matters without consulting Parliament during the exceptional post-war conditions.[4] Laws of a constitutional character could only be changed by a two-thirds majority in the chambers.

The Constitution of 1920 set up two legislative chambers. Of these, the National Council was to be representative of the people at large and directly elected. The Federal Council, composed of members elected by, but not necessarily from, the *länder* parliaments, was to represent the provincial interests. It was given a power to veto Acts passed by the National Council within eight weeks, but must give way if that body passed the measure a second time with a higher majority. It also envisaged the possibility of a plebiscite or referendum to the whole adult population on the Swiss model. This was to be optional on any matter and obligatory in the case of a "total change" of the constitution of the State. The Federal Executive was to be headed by the Federal president (*Bundespräsident*), responsible to and appointed by the "Federal Assembly", *i.e.*, both houses sitting together. Under him a Federal Chancellor and Ministers had the daily conduct of affairs, subject to a dual responsibility: (a) legal, for breaches of the law by indictment before the

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[4] *Kriegswirtschaftliche Ermächtigungsgesetz.*

Constitutional court; (b) political, since the effect of a vote of no-confidence in the Chamber was automatically to vacate the office of the Minister or Ministers concerned.

Side by side with this central organization, the 1920 constitution also set up a single-chamber diet in each of the various *länder*. The executive in the *länder* was on the old imperial lines with a *landeshauptman* elected by the local diet at its head. The chief judicial organ of the new State was the very important Constitutional court already mentioned. Before it the legality of any enactment, whether of the Federal or of the provincial diets, administrative order or official act might be tested. The constitutionality of a proposed enactment could be tested even before it was passed.

All this constitutional machinery still exists today after what might tactfully be called the totalitarian interlude.[5] The process began with an Amendment to the Constitution in December, 1929, the effect of which was to strengthen the conservative elements in the State. This was to have been done partly by a reform of the Federal Council, by which it became the *Länder-und Ständerat*, *i.e.*, representative of various occupational groups as well as of the *länder*. Owing to left wing opposition, however, the new body differed from the old one only in name, the basis of its composition remaining "temporally" unchanged. The minimum age for voters was also raised. More important than these was the great increase in power of the Federal president, who was changed by this 1929 amendment from the status of a figurehead to a position of great authority. The government was in future to be appointed and dismissed by him, and not, as before, by the Chamber. An "emergency" power to legislate was also introduced, though not as yet used.

Meanwhile political events were moving swiftly to a climax. The Social Democrat and *Heimwehr* parties each made use of private armies, which became more and more influential. In this difficult situation catholic Austria had recourse to her ancient ally, the Church. The Christian Social party, led by Hr. Dolfuss, gained power. The Austrian people, comparative newcomers to the ideas of Parliamentary Democracy, laid the blame for unsettled conditions on Parliament. When in 1933 the presidents of the National Council resigned, there was no legal machinery for its re-assembly as its standing orders required it to be summoned by the presidents. Meanwhile, the Dolfuss government continued to rule and to legislate under the " emergency " power already noted. This was even used to draw up a new constitution on April 24, 1934. Under this, a totalitarian structure was evolved, based on analogies from Fascist Italy, and with a strong clerical influence obviously present. Once this had been done, it was thought safe to reconvene the rump of the old Parliament, which, since after the risings of February and July, 1934, both Social Democrat and *Heimwehr* parties were now illegal, consisted entirely of Christian Social or sympathizing members. They passed various measures declaring the new constitution to be " constitutional " under the old constitution. The requirement that a " total change " of national organization should be submitted directly to the people was retrospectively abolished. A new enabling Act allowing the Government very wide powers of legislation without parliamentary control was also agreed to. On May 1, 1934, the new constitution came into force and on July 5 a concordat was made with the Holy See, which was declared to be a fundamental part of the new constitution.

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[5] The phrase is that of Professor Mokre.

The new situation was summed up by the change which was made in the official title of the State by this constitution. It was no longer to be even in name, the " Republic ", but only the " Federal State " of Austria. The characteristics of the new State were, nonetheless, centralization and authoritarianism. Various " Councils " were set up, but they consisted of nominated, not elected, members, and had no power to initiate legislation, but only to consider what was referred to them by the Government.

Although the Constitutional court was retained as the "Federal court", the wide powers of the Government and President to legislate, even on constitutional changes, left it deprived of its most significant functions.

The rest of the story is common knowledge. Rather than agree to the German "reunion" ultimatum in 1938, the Federal President, Dr. Miklas, resigned. Under the terms of the constitution the Chancellor (Seyss-Inquart) thereby became acting president with full powers. The German troops could then march in, and the "Law of Reunion" (*Anschluss*) was passed in both countries. By it Austria became "Ostmark", an integral part of the Reich. It is difficult to deny that this measure was outwardly "constitutional", if by that we mean in accordance with the then prevailing constitution. On the other hand, of course, it can be argued that the use of force vitiated the entire proceedings. But it has long been recognized (illogically) that force is not a vitiating element in international transactions, which in effect this was.

At first sight, it seems to say much for the strength of the Federal idea in Austria that on April 1, 1940, the Germans recognized each of the former Austrian *länder* as a separate *gau* of the Reich instead of collectively one as Ostmark. In reality, however, this was part of the Nazi policy to make Austria forgotten as a separate nation. This is shown by the fact that *Ober-* and *Niederösterreich* were as *Gaue* styled *Ober-* and *Niederdonau*—the very name "Austria" being extinguished.[5a]

The Atlantic Charter of 1941 announced the intention of the Allies to restore Austrian independence, and declared the annexation of 1938 null and void. When allied troops appeared in Austria in 1945, they found the whole organization of the State (so far as it existed at all) in the hands of members of the National Socialist party. Dr. Karl Renner, however, who had been the first Federal Chancellor in 1918, was living as a private citizen near Vienna. After consultations with other veteran politicians, he issued on April 27, 1945, a proclamation in which he announced the restoration of the Republican Constitution of 1920, and a provisional coalition government was formed. This claimed to have supreme authority in the *länder* which had been Austrian up to the time of the *Anschluss*. On May 1, all the laws which had existed up to March 5, 1933, were restored, including the constitutional amendment of 1929. Certain provisional modifications had to be made, however, because of the then prevailing rule prohibiting any kind of movement by Austrians between the various allied zones. On December 19, the 1929 Constitution was actually put into force again.

[5a] So, too, on the union of England and Scotland an attempt was made to substitute the phrase "North Britain" for the too national term "Scotland". It was naturally not a success.

Owing to the present lack of co-operation among the four occupying powers, it is likely that no further changes will be made in the Austrian constitution until after the proposed treaty comes into force, whenever that may be.[6] By the second Allied Control Treaty of June 26, 1946, which is the one now in force, Austrian legislation on ordinary matters is effective unless all four powers agree to veto it, constitutional legislation is only effective if they agree to approve it. Since unanimity on such quasi-political matters appears unlikely, the present arrangements will continue until Austria becomes once more a fully sovereign State.[7]

It is not for the constitutional lawyer to weigh the advantages of any political machinery, but the foregoing account of Austria's tragic experience in this matter does at least give grounds for reflection—perhaps rare in a comparative lawyer—on the superiority of British constitutional arrangements, with their deep reverence for tradition combining so effectively, if unexpectedly in the view of more doctrinaire peoples, with an apparently easy adaptability to change, sometimes very profound change, in current political thought, without the slightest break of ordered continuity. But this need not mean that the division of Great Britain into three or more separate *länder* would inevitably bring disaster.

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[6] Austrians do not like the phrase "Peace Treaty", as they claim that their country as such was never at war. They speak of *Staatsvertrag*, "Treaty of State". (J.M.)

[7] For a detailed account of Austrian constitutional law, see Adamovitch, *Grundriss des Österreichischen Verfassungsrechts*. (1947.)

C. d'O. Farran.

A GENERAL THEORY OF PUBLIC CONTRACTS

"ALL rights", said Mr. Justice Holmes,[1] "tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighbourhood of principles of policy which are other than those on which the particular right is founded and which become strong enough to hold their own when a certain point is reached." In that sense every legal concept, so far as it claims universal application, contains within itself the germs of its own destruction. The present purpose is to examine the field of conflict between the two concepts of sovereignty and of the sanctity of contracts, a conflict which is likely to grow in importance with the spread of governmental activities.

It is common to speak of the State as sovereign. If the word "sovereign" is here used in an Austinian sense, denoting a supreme authority, then, although Austin himself was careful to distinguish his sovereign from the State, the logic of his maxim that sovereign power is incapable of legal limitation [2] must deny any legal validity to contracts between the State and an individual. On the other hand obvious practical considerations, in particular the need to maintain the credit of the State, insist that the obligations of the State must be honoured,[3] and indeed it has been urged that the obligations of the State are to be more strictly regarded than those of individuals.[4] Yet again the needs of the security of the State may require freedom of action unfettered by contractual obligations. The object of this article is to ascertain the principles by which these conflicts may be resolved. Even though ultimately the solution may not be found in the doctrines of sovereignty it is necessary to start with a discussion of them since, not only is it common to treat the problem as one of sovereignty, but also the words " sovereign " and " sovereignty " abound in the judgments on the topic.[5]

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[1] *Hudson County Water Co.* v. *MacCarter* (1907), 209 U.S. 349, at p. 355. Throughout reference will be made to American authorities, since, as a result of constitutional provisions, most obviously the Contract Clause (Article 1, § X, para. 1) of the United States Constitution, the problem has there received much greater attention. These authorities of a cognate jurisdiction seem therefore likely to be of assistance in finding the domestic rules.

[2] *Province of Jurisprudence Determined*, Lect. VI (p. 264, 5th ed., R. Campbell). For the distinction between Austin's sovereign and the State see, *ibid*, p. 221.

[3] See for example Pitt's protest against the deduction at source of tax on income derived from Government Stock, quoted by A. Farnsworth, 66 L.Q.R., p. 365–6, and see *Att.-Gen.* v. *Lindegren* (1819), 6 Price 287, and see also *Lynch* v. *United States* (1933), 292 U.S. 571, at p. 580, and *Perry* v. *U.S.* (1934), 294 U.S. 330, at p. 353.

THE POSSIBLE APPLICATION OF THEORIES OF SOVEREIGNTY

The statement of the conflict as between two absolute conceptions is obvious but it is no doubt an over-simplification and involves numerous assumptions. In the first place it assumes acceptance of an Austinian view of sovereignty and the identification of the sovereign thus defined with the State as a " contracting " party. Neither of these assumptions is universally made and the second was specifically denied by Austin himself. As to the first, it has been argued that the power of the sovereign may be limited by the circumstances of his creation. Thus Locke insists that

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[4] See, *e.g.*, Bodin, *The Republic*, Ch. 8, p. 106 (Knolles Translation): " The sovereign prince is bound unto the contracts by him made be it with his subject or with a stranger for seeing he is warrant to his subjects of the mutual conventions and obligations that they have one of them against the other of how much more reason is he the debtor of justice in his own fact and so bound to keep faith and promises by himself given and made to others ". The obligation is, it seems, however, a moral one springing from the double bond of " natural equity and the word of a prince ". There is perhaps a curious echo of this idea in Professor Laski's introduction to his translation of Duguit's *Law and the Modern State*, where speaking of the rule of law (in Duguit's sense, *i.e.*, the requirement of social purpose) he says at p. xvii: " It is imposed upon public persons even more than upon private because their situation makes incumbent upon them a greater sense of their responsibility for its realization ". Compare also *Perry* v. *U.S.*, 294 U.S. 330, with *Norman* v. *Baltimore & Ohio Rly. Co.*, 294 U.S. 240, on the effects of the " Gold Clause " legislation on private and Federal contracts.

[5] See, *e.g.*, *Feather* v. *The Queen* (1865), 6 B. & S. 257. The use of the word " sovereignty " in this context is made all the easier by its common use in denying the right to sue a foreign sovereign State in the English courts, see *The Porto Alexandre*, [1920] P. 30. As will appear, this is a confusion of two separate ideas. The looseness of the use of the word " sovereignty " is perhaps best illustrated by *Perry* v. *U.S.*, *supra*, where it is claimed that the ability to make a binding contract is one of the marks of sovereignty.

"the supreme power cannot take from any man any part of his property without his own consent",[6] arguing that government has come into existence for the purpose of preserving property and hence that the power of the sovereign is limited by this purpose.[7] Here the limitations envisaged are those of the civil law, or of the fundamental law of the State, even though ultimately their enforcement can only be by insurrection.[8] In fact they are little removed from limitations of natural law yet, at least, there is in Locke a clear belief that the sovereign power in a State is not to be exercised arbitrarily but for the public good.[9] To Bodin the limitations of the power of the sovereign are in part those springing from natural law where he says, "But as for the law of God and nature all princes and people are unto them subject",[10] and in part those springing from the civil law itself. Thus, he says,[11] "touching the laws which concern the State of the realm and the establishing thereof, forasmuch as they are annexed and united to the Crown the prince cannot derogate from them". Here he is speaking of such matters as intimately concern the ruler himself, citing the Salic law as an instance of these unalterable rules. Again although Bodin has defined his sovereign as " legibus solutus "[12] yet, in Bodin's view, if the prince has sworn to keep the laws, he is bound by that oath to another prince who has an interest in the maintenance of the laws. Likewise Bodin asserts : " That the prince is not subject to his laws nor to the laws of his predecessors but well to his own just and reasonable conventions and in the observation whereof the subjects in general or particular have interest ".[10] Bodin's sovereign certainly appears to be capable of creating enforceable rights against himself since Bodin regards it as normal that where the king is a debtor he may be sued and " enforced to pay the debt ". It is his oaths as to the laws which are not in the last resort binding upon him, and it is for that reason that he insists upon the distinction between laws and contracts since as to the former he is no longer bound by his oath once the reason for the law has gone. Thus it would seem that Bodin draws a distinction between certain contractual obligations which the prince must observe and which may be enforced by the civil law and his political obligations which rest solely on the force of natural law. Nevertheless considerations of natural law are also adduced to support the concept of contractual obligations, so that even these latter seem to be in part founded on the moral law. This distinction between political or public obligations and private engagements is one to which it will be necessary to revert.

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[6] *Second Treatise on Civil Government*, Ch. XI, § 138.

[7] To the same effect, *op. cit.*, § 137: "Absolute arbitrary power or governing without settled standing laws can neither of them consist with the ends of society and government which men would not quit the freedom of the state of nature for and tie themselves up under were it not to preserve their lives liberties and fortunes; and by stated rules of right and property to secure their peace and quiet".

[8] Compare the declaration of the Estates of Scotland in 1689 whereby "The estates of the Kingdom of Scotland find and declare that King James VII . . . hath invaded the fundamental constitutions of this Kingdom . . . whereby he hath forfeited the rights of the Crown and the Throne is become vacant". Reprinted in *Somers Tracts*, Vol. 2, p. 387.

[9] This is most fully expressed in § 221. "There is therefore secondly another way whereby governments are dissolved and that is when the legislature or the prince either of them act contrary to their trust." The breach on the part of legislature occurs when they invade the property of the subject or attempt to create an arbitrary disposer of the lives, liberties or fortunes of the people. This "trust" concept is one that finds frequent expression in the cases in the United States concerned with the police power, see, *e.g.*, *Chicago B. and Q. R. Co.* v. *Illinois* (1905), 200 U.S. 561, at p. 586.

[10] *The Republic* (Knolles Translation, p. 92). Compare also the assertion of Bartolus that any oath to derogate from regality is void. Dr. Figgis, *Bartolus and European Political Ideas*. Transactions of Royal Historical Society, Vol. 19, p. 158,

[11] *Ibid.*, p. 95.

At times, however, this conception of contract has been used in broader attempts to maintain limitations on the power of the Crown as a sovereign. Thus, Hale, in his reply to Hobbes,[13] attacks the ideas that there are no qualifications imposed on the power of the Crown which the Crown may not repeal, that the Crown may derogate from the subject's property as it sees fit, and that the Crown is the sole judge of the public need and of the measures which that requires. Such ideas he finds without any shadow of law or reason to support them, and then proceeds to envisage the possibility of a contractual obligation to maintain particular laws, an obligation apparently intended to be enforceable in the courts yet one which he is also forced to make dependent on "the sight of God and the bonds of natural justice".[14]

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[12] " Majestas est summa in cives ac subditos legibusque soluta potestas " or as Knolles puts it (p. 88) : " Unto majesty or sovereignty belongeth an absolute power not subject to any law ".

[13] Printed as Appendix III to Vol. V. Holdsworth, *History of English Law.*

It was against all such limited sovereigns that Hobbes set his face; for him the power of the sovereign must be "as great as possibly men can be imagined to make it". Property was to be held subject to the will of the sovereign, and although the sovereign might break his trust and the law of nature yet "this is not enough to authorize any subject either to make war upon or so much as to accuse of injustice or in any way speak evil of their sovereign".[15] Indeed the subjects were to be taught "how great a fault it is to speak evil of the sovereign representative whether one man or an assembly of men or to argue or dispute his power".[16] Here the power of the sovereignty is without limits, above dispute, and almost beyond discussion, and legal obligations of the sovereign are impossible against such a background.

Clearly, the possible arguments are not exhausted by these two extremes of the controlled sovereign, controlled albeit by principles which are both nebulous and uncertain of enforcement, and the sovereign who is beyond control; (beyond control either because that lack of control is essential to the well-being of the commonwealth, as with Hobbes, or, as with Austin, because the sovereign is pre-legal as the creator of law and so logically cannot be controllable by law). Between these extremes it is yet possible to find intermediate stages. Of these the argument of Salmond may perhaps be taken as an example because of its familiarity. Salmond rejects[17] the widest claims of Hobbes and while admitting that the sovereign power cannot logically be controllable or be capable of self-limitation within its own sphere, contends that that sphere may itself be defined by law. Here there appears to be the resurrection of the older principle which found expression in Fortescue in talking of the government of England as being a régime " politicum et regale "[18] and by Bracton when he claims that " Rex non debet esse sub homine sed sub Deo et Lege ".[19] To this argument Hobbes might have replied that under such a system either you have no sovereign, in which case your commonwealth must perish, the sovereign being in his view its soul and vital force, or else he might have asserted that you have merely transferred your sovereignty to that body which determines whether any given action falls within or without the appropriate sphere of " sovereign " activity.[20] Moreover, within these limits attempts may be made, as by Ihering, to resolve the problem posed, by the theory of self-limitation of a sovereign by his contracts. At times these theories have appealed to the courts,[21] but they seem to be lacking in certainty and logical validity and have never properly formed the basis upon which the courts have worked.

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[14] "For certainly kings as well as others are bound to keep their faith and promises. And as it is so much the more oblidgeing where such pacts and concessions are not purely gratuitous, as some kinds of grants are, but such as are made upon mutual contract, stipulation, and thus for the most part are all Acts of Parlement and Parleamentary Consessions wherein the subject grants some things to ye King as Aydes Supplyes Subsidies Tenths or Fifteenths and ye Kinge at their request grants them Laws and Liberties. And thus the Great Charter and the Charter of the Forrest . . . . But this is not all, most of the important grants in Parlement of liberties to the people were not so much new grants of new liberties but Restitutions of those very Liberties which by the Primitive and Radicall Constitution of the English Government were of Right belonging to them."

[15] *Leviathan*, Ch. 24.

[16] *Ibid.*, Ch. 30.

This brief outline is sufficient to show that the preliminary statement of the problem as a conflict between the concepts of sovereignty and the sanctity of contract is at least ambiguous in using the word "sovereignty" of which no single meaning is universally accepted.[22] It has, moreover, assumed that the doctrine of sovereignty in some form must necessarily be involved in any discussion of State activities, yet it is sufficient to refer to Duguit's *Law and the Modern State* to demonstrate that this is a hypothesis which is not necessarily accepted.

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[17] *Jurisprudence*, 10th ed., Appendix I.

[18] *The Governance of England*, Ch. 2.

[19] Cf. the first four essays in Professor McIlwain, *Constitutionalism and the Changing World*.

[20] It may be argued that these former discussions have little or no relevance to present conditions being in effect concerned with the limits of royal powers and the merits of despotic monarchies, and moreover being influenced by the medieval ideas under which property and jurisdiction were inextricably mixed. It is conceived however that they are relevant in that what is in fact discussed is the essential power of government which in latter days may have changed its form but is, in essence, a constant feature of organized society.

[21] See in the United States *Dodge* v. *Woolsey* (1856), 18 How. 331. Mr. Justice Wayne at p. 351, or Mr. Justice Holmes in *The Standard Oil Co. of New Jersey* v. *U.S.* (1924), 267 U.S. 518.

Even if, for the moment, this question of the usefulness of the idea of sovereignty is neglected, the problem which we have outlined would only exist if an individual in making a contract with the State were faced by "the sovereign" as the other contracting party.[23] It is evident that the protagonists of the various theories outlined are generally concerned with a power to make laws and not with the general administrative activity of government. Thus Bodin speaks of the making of law as the chief mark of sovereignty; he asserts that, in it are comprised all other rights[24] and in his initial definition speaks of it as being "the greatest power of command". To Locke "the first and fundamental positive law of all Commonwealths is the establishing of the legislative power . . . the legislative is not only the supreme power of the Commonwealth but sacred and unalterable in the hands where the community have once placed it".[25] With Hobbes it was inevitable, since he was concerned to show that a monarchy was the best form of government, that the function of legislation should not be unduly emphasized, yet even for him the main purpose of the sovereign—the " procuration of the safety of the people "—was to be achieved primarily by " the making and execution of good laws ".[26] It must however be admitted that to Hobbes the list of powers which he regarded as the essential mark of a sovereign and hence inalienable is much wider. It is arguable therefore that, to the extent that the contentions about sovereignty have centred on the legislative power, they are irrelevant to our problem. Certainly in the case of Bodin the distinction which he made between the laws and contracts of the sovereign is significant.

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[22] It is obvious that we have not here exhausted the possibilities of conflict. Thus Rousseau with the theory of general will, can open further fields. For a review of the varied definitions and applications of the word "sovereignty" see "The Theory of Sovereignty", by W. J. Rees in *Mind*, Vol. LIX, p. 493.

[23] This may perhaps be most clearly seen by a reference to Cooley's *Constitutional Limitations*, 10th ed., p. 7. He speaks of sovereignty thus: "Sovereignty as applied to States imports the supreme absolute uncontrollable power by which any State is governed. A State is called a sovereign State when this supreme power resides within itself whether vesting in a single individual or in the whole body of the people". There is here a clear distinction between State and sovereign. The question is therefore, so far as concerns contracts, are they made with the internal sovereign power, or with the "State" which in its internal aspect is not here regarded as sovereign?

[24] *The Republic*, pp. 156, 159 (Knolles Translation).

[25] *Second Treatise of Civil Government*, Ch. XI, § 134. This primacy of the legislative power is again emphasized in Ch. XIII, § 149, "Though in a constituted commonwealth . . . there can be but one supreme power which is the legislative to which all the rest are and must be subordinate". The emphasis on the inalienable nature of the legislative power in the quotation in the text is important.

Nevertheless it is true, as Hobbes shows, that this concentration on legislative power is not universal, and again as a convenient example of the exposition of opposite theories Salmond may perhaps be taken, because he is concerned with the particular position arising in the United Kingdom. While Salmond admits the necessity for a sovereign he denies that the sovereign power is indivisible, and finds in England a sovereign legislature and a sovereign executive power, the former being held jointly by the Crown and Parliament, the latter being held in severalty by the Crown.[27] Each he says is supreme within its sphere, and therein it seems lies the difficulty of his contentions. It is admitted that general legislation is outside the sphere of the Crown. But can it be said that Parliament (*i.e.*, the Crown and the two Houses of Parliament acting in unison) has any sphere in a limited sense? Salmond's answer to this question is to be found where he says, " As the law of England actually stands there are no legal limitations on the legislative powers of the Imperial Parliament ". If this means that there is no legal limit to the power of Parliament to " declare legal rules " (his definition of legislation), it is doubtless correct yet surely too limited. The activities of Parliament are not thus confined. If Parliament chooses to take upon itself the performance of administrative acts there is no rule of law which can prevent it. It is true that these actions must be clothed in a legislative form; the declaration of war, the approval of a contract must take the form of an Act of Parliament, but in that form the courts must accept it as binding. There is it seems this dilemma. If the distinction between a legislative act and an administrative act is one of form only, then it is true that Parliament can never perform an administrative act,[28] but it is equally true that the possible legal scope of its legislative activity embraces the entirety of that sphere of governmental activity which is generally exercised by the Crown under its several power.[29] If the distinction between an administrative and a legislative act is one of substance, and the form is irrelevant, then again it is apparent that Parliament is competent to administer and, in fact, does so. The Appropriation Act may fairly be regarded as an administrative activity[30] regulating the consolidated fund and there is no limit save that set by convenience to the extent to which this direct intervention in the administration may be carried. Again, Parliament in legal theory can embrace the sphere of activity of the Crown. It follows therefore that in this country we have either two sovereigns concerned with the same field (which is *ex hypothesi* impossible) or else that one of them is not, or neither of them is, sovereign. This potential regulation of the several activities of the

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[26] *Leviathan*, Ch. 30.

[27] *Jurisprudence*, 10th ed., Appendix I.

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[28] Cf. Sir W. I. Jennings, *The Law and the Constitution*, 3rd ed., Appendix 1, p. 274, "with us legislation is either the substance of what is enacted by Parliament or the process of enacting that substance. Parliament legislates when it enacts and what it enacts is legislation".

[29] See, *e.g.*, *Edinburgh & Dalkeith Ry.* v. *Wauchope* (1842), 8 Cl. & F. 710, *per* Lord Campbell. Provided the statute appears on the Parliament Roll it appears that the courts must apply it.

[30] See the discussion of *Churchward* v. *The Queen* (1865), L.R. 1 Q.B. 173 in 13 *Modern Law Review* (1950), at p. 463 *et seq.* See also *R.* v. *Fisher*, [1903] A.C. 158 or, *Lovett* v. *U.S.*, Ct. of Claims, November 5, 1945, where the express prohibition of disbursement by statute was held not to bar a claim to salary. For a general discussion, see H. Street, "The provision of funds in satisfaction of government liabilities", *Toronto Law Journal* (1949), Vol. 8, p. 32.

Crown is admitted by Salmond[31] but he reconciles it with the sovereignty of the Crown by asserting that since the Crown forms an essential part of the legislature the former is not subject to the latter and hence remains sovereign. This answer, it would seem, does not go far enough. Salmond contends: "That sovereign power may be legally controlled within its own province is a self-contradictory proposition". Yet it is recognized that where statute and royal prerogative cover the same field the former prevails to the exclusion of the latter.[32] If that be true it follows that a sovereign's renunciation of a portion of his sovereignty is binding. Yet it is just that proposition which Salmond denies in relation to Parliament because of the latter's sovereignty. Moreover the acceptance of Salmond's proposition involves the assertion that none of the conventions regulating the appointment of Ministers of the Crown, through whom alone the Crown can act, is law. This, in itself, is an assertion which is not unchallenged.[33]

It is noticeable that here Salmond goes further than Austin who is at pains to deny the sovereignty of the Crown in England.[34] Immediately, the purpose of calling attention to this controversy is only to indicate that our preliminary problem in opposing "sovereign" to "contract" assumes that the individual who enters into contractual relationship with an organ of the State is necessarily attempting to contract with a sovereign. If the Crown in Whitehall as distinct from the Crown in Parliament is not sovereign then the opposition of ideas does not *prima facie* exist when we speak of the contracts of the Crown.[35] It may do so if the

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[31] Appendix I above referred to (Note 27).

[32] *Att.-Gen.* v. *De Keyser's Royal Hotel*, [1920] A.C. 508. Even if we accept Lord Moulton's view that the prerogative goes into abeyance only, yet it needs another Act of Parliament to call it out of abeyance.

[33] *Jennings*, *op. cit.*, Chap. III.

[34] *Province of Jurisprudence Determined*, Lect. 6.

[35] See, *e.g.*, *Austin*, *op. cit.*, p. 269, "Considered collectively or considered in its corporate character a sovereign number is sovereign and independent but considered severally the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts. Consequently though the body is inevitably independent of legal

Crown is to be treated only as an agent for the "sovereign", whatever this may be. That however is not the way in which the position has hitherto been regarded, and it must be remembered that in England the "Crown" is not (at any rate internally) synonymous with the "State".[36]

This is moreover but one instance of this particular difficulty. If instead of a unitary system of government one is concerned with a federal government, as in the United States of America, it seems that any theory of sovereignty is unlikely to afford much guidance in determining the effect of a contract with either a component State or with the federal government or of one between a State and the federal government.[37] In such cases even the theory of locating sovereignty with "the people" is unlikely to be of great assistance and will only lead to further complexities in defining the seat of sovereignty in respect of the parts and the whole of the federation. Are, for example, the people of Texas sovereign in two capacities, one State and one federal? Again those difficulties arising from federations are but an illustration of the falsity of the problem as posed, since, as will become apparent, the question is also raised of the extent to which subordinate public authorities are entitled to claim freedom from the contracts into which they have entered.[38] Here "sovereignty" on whatever theory cannot alone supply an answer, since non-sovereign bodies are involved.

These difficulties of locating the sovereign cannot be resolved by asserting (contrary to English practice) that the contract is made with the State and that the State is

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or political duty any of the individuals or aggregates whereof the body is composed may be legally bound by laws of which the body is author". See also *ibid.*, p. 289.

[36] Maitland, *Selected Essays*, "The Crown as a Corporation Sole", and see Holdsworth, "The Prerogative in the 16th Century", 20 *Columbia Law Review* 554, at p. 562. "The English King therefore was far from being the sovereign power in the State." See also Coke 4 Inst. "The king and the three estates were the great corporation or body politic of the kingdom".

[37] For some of these difficulties, see, *e.g.*, *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley, Ltd.* (1940), 63 C.L.R. 278.

[38] *Ayr Harbour Trustees* v. *Oswald* (1879), 11 Ch.D. 661. *Birkdale Electricity Supply Co.* v. *Southport Corporation*, [1926] A.C. 364

sovereign, since in truth when we speak of a sovereign State we are really using sovereignty in another, an international, sense to describe a State over which none other has dominion. When we are speaking of a sovereign as hitherto in an "internal" sense we are speaking of a sovereign authority within the State, and this authority is not and has not been treated as identical with the State.[39]

If then the theories of sovereignty are uncertain, conflicting and perhaps unnecessary, can it be said that the problem posed does not exist? To such a question the answer must be that the problem of the extent to which the contracts of a State or of a public authority are binding upon it does exist. In America it has been mainly argued, first under the contract clause (in regard to the States), and subsequently under the Fourteenth Amendment, in France it is argued on the distinction between the administrative contract and that of private law, in England it has been raised in its most striking form in *The Amphitrite*.[40] No solution to the problem is to be obtained, however, from any doctrines of sovereignty. To the lawyer faced with a contract abrogated by a government department the shifting sands of the theories of sovereignty can afford no foundation on which to base his opinion. His position is perhaps worse when he is also faced by the mists of natural law limitations upon sovereignty. He will fail to find an answer based upon such doctrines not merely because of their inherent uncertainties but also because the problem is in reality not one of sovereignty at all. It is conceived that, despite the appearance of some of the cases, it is not through sovereignty that the lawyers have ever dealt with the problem. That concept is rather one foisted upon them by the political scientists. Since it has, nevertheless, often been phrased in that way it was necessary to demonstrate some of the confusions which that manner of phrasing entails. Moreover, the discussions of sovereignty do point the way to what is conceived to be the true principle. The assertion by Hale that even laws themselves may be the subject of contract and so irrevocable stands in isolation. The distinction drawn by Bodin between political and private obligations is more typical. This distinction finds expression in the recognition of attributes of the sovereign essential to the purpose of government and so inalienable. Thus Locke speaks of the power to act " according to discretion for the public good without the prescription of the law and sometimes even against it ".[41] Hobbes having defined the rights of the sovereign calls them " incommunicable and inseparable "[42] and says it is the office of the sovereign to maintain these rights entire.[43] Similarly Bodin himself when he has set out the essential rights of his sovereign denies that they can be granted to the subject, or that the title of the sovereign can be prescribed against by the subject.[44] It is in this emphasis on the need to preserve the essential powers of government that the true solution lies, and where the courts speak of sovereignty it is the ability to govern which is really meant.[45]

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[39] This confusion in the use of the term "sovereignty" is apparent when the maxim that a foreign sovereign cannot be impleaded in the English courts is carried over to imply that the sovereign State cannot therefore enter into contracts involving a legal relationship. The latter may well exist even though the means of enforcing the obligations flowing from them are defective. This distinction is clearly recognized in such cases as *Prioleau* v. *United States* (1866), L.R. 2 Eq. 659.

[40] *Rederiaktiebolaget "Amphitrite"* v. *The King*, [1921] 3 K.B. 500.

Before asserting what is believed to be the real matter in issue a preliminary point may be made. Just as the word " sovereignty " is ambiguous the phrase " sanctity of contract " is not one without any limitation. In seeking a principle which will justify another limitation, what is sought is not therefore anything new in kind. It is today common to see that sanctity infringed by the law. The bankruptcy laws or the doctrines of frustration are but two examples among many where the termination of the contract is thought justified by a general public interest. To assert therefore that special rules may be applied to the contracts of public authorities, under which the public authority may be held less firmly or differently to their contracts than would be an individual citizen, is only to claim a novel application of a principle already recognized in the law of contract and not to claim a new principle. What novelty there is lies in the justification of a particular rule for public contracts, and in the following pages an attempt is made to outline that rule and its consequences.

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[41] *Second Treatise on Civil Government*, Chap. XIV. Prerogative, § 160. See also § 164. See also Note 25 (*ante*).

[42] *Leviathan*, Part II, Ch. 18.

[43] *Leviathan*, Part II, Ch. 30.

[44] *The Republic*, pp. 156 *et seq*. Knolles Translation. Compare Prof. H. M. Cam, " The Quo Warranto proceedings under Edward I ", *History*, July, 1926, and Dr. G. T. Lapsley on the same topic in the *Cambridge Historical Journal* of 1927.

[45] See the distinction made in *N. America Commercial Co.* v. *U.S.* (1897), 171 U.S. 110 at p. 137. For the growth of this concept of inalienable powers, see Gierke, *Political Theories of the Middle Ages*, trans. Maitland, p. 83, *passim*.

The Theory of Governmental Effectiveness

What is believed to be the true basis of any special privileges of public authorities lies, it has been suggested, in the governmental character of these bodies. It is apparent that a State will in fact exercise a power of self-preservation and with that end in view will denounce obligations incurred which, as events turn out, jeopardize its existence. In international law this right of self-preservation is, within limits, recognized,[46] and is preserved in Art. 51 of the Charter of the United Nations. When, however, we are speaking of the State in its internal aspect, the phrase " self-preservation " must mean something more than simply preserving its territorial integrity or the suppression of rebellion. In fact, a government and its agencies exist to govern[47] and to do so within the limits imposed by either the constitutional document or the theory of the community for which they exist. It would therefore be reasonable if in recognition of this factual necessity the law allowed, in the internal sphere also, a freedom of action greater than that allowed to individuals. In the sphere of contract this would mean that no contract would be enforced in any case where some essential governmental activity would be thereby rendered impossible. It is this principle which it is contended is in fact embodied in the law.[48] It should, however, be noticed that although, for the sake of brevity, this principle is related to contracts only, this fundamental principle of effective government is one of widespread application.

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[46] See, *e.g.*, Prof. Lauterpacht in *Oppenheim's International Law*, 7th ed., Vol. 1, pp. 265–7.

[47] That delight which has been reputedly found in the American Constitution as government by inertia, is apt to be short lived. In an emergency power must be found and will be found even at some risk of stretching constitutional doctrines. See, *e.g.*, Prof. E. S. Corwin, *Total War and the Constitution.*

It must be admitted that as thus expressed the principle is vague. It is vague in two respects, since it leaves open the questions—what are these governmental activities and what is the effect of the doctrine upon the contract? Thus it is possible that the doctrine could render the contract void *ab initio* or simply allow a right to terminate when the inconsistencies of the obligations of government and the obligation of contract become apparent. In the latter case the doctrine as applied might or might not allow for compensation. Some further definition of the principle must therefore be attempted.

The nature of this alleged fundamental principle may perhaps at this stage be illustrated by what is thought to be its widest application—that is in the prevailing denial of compensation to individuals who may suffer loss or inconvenience as a result of general legislation. In effect the government of the community would be rendered impossibly burdensome by any other solution.[49]

In theory this concession of special privilege and of the pre-eminence of public necessity is no novelty, but its growth in practice has been slow. Thus Dr. Figgis could write "In the middle ages we see public right shaping itself out of private rights. The powers of the sovereign are the special attributes of a peculiarly placed person; whether prerogative of crowns or privileges of Parliament. They are not the necessary attributes of public authority conferred as something quite other than any other rights".[50] Nevertheless there is here a recognition that the special position of a person may require that the law shall treat that person differently. It was one of the weaknesses of Dicey's exposition of the rule of law [51] that it contemplated that similar rules should be applicable both for public and private persons whereas the differences of their nature and purposes require that they should be treated differently. It is not, however, only the particular position of a legal person which requires this different treatment by the law, it is as much difference of purpose. When we say that the function of government is to govern we are admitting not only that the organs of government have a different position, in the sense of greater powers and greater responsibilities, from that of an individual citizen, but we are also admitting, at least so far as we are speaking of democratic forms of government, as they exist for example in England, that these powers of government are conferred not for the benefit of the government as such but for the benefit of the community as a whole. The recognition of special privileges, in the sense suggested, is therefore only a recognition of the platitude that public benefit may on occasions outweigh private right.

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[48] Thus in *Att.-Gen.* v. *Parmeter*, 10 Price 378, Macdonald, C.B., says "The private rights of the Crown may be disposed of, but the public right of the subject cannot even if it be within the grant". This argument is based upon public necessity, in that case in connection with ports.

[49] See, *e.g.*, Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U.S. 393, at p. 413. In England, although the introduction of controlled rents under the Rent Restriction Acts and cognate legislation may seriously reduce the value of property, no suggestion of compensation to the landowners could be entertained without rendering the system unworkable. Compare the Town and Country Planning Act, 1947, which effects a confiscation but allows compensation. See the discussion of this matter in the Final Report of the Uthwatt Commission (Cmd. 6386).

It is this concept of public good which we find clearly added to the concept of special position in Grotius when he says, speaking of public contracts, "Here also this should be added, that if by any chance a contract should begin to lead not merely to some loss but to the ruin of the State so that the contract if carried to conclusion would have to be considered unjust and illegal from the beginning, it is possible, not exactly to revoke it, but rather to declare that it has no further binding force as if made under a condition without which it could not have been justly made ".[52] There is therefore here a close connection with the doctrine of eminent domain which is emphasized where Grotius says " This also ought to be known, that through the agency of the king even a right gained by subjects can be taken from them in two ways either as a penalty or by force of eminent domain. But in order that this may be done by the power of eminent domain the first requisite is public advantage; then that compensation from the public funds be made, if possible, to the one who has lost his right. Just as such a result is accomplished in other things then so also in respect to the right which is created by a promise or contract ".[53] Here it will be noticed that he places the right on the grounds of public advantage; others such as Pufendorf rested it in public necessity; and Bynkershoek, who would freely grant the right on either ground, regarding the distinction as a quibble, yet emphasized the modification required in its exercise and its essential nature as serving a public purpose.[54]

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[50] *From Gerson to Grotius*, p. 10.

[51] *The Law of the Constitution*, Chap. IV.

The justification of this principle is not purely theoretical. In its wider application it has in effect been acted upon. The argument whether or not one Parliament can limit the powers of its successors becomes an argument, not on the sovereignty of Parliament, but on whether one portion of the governmental machinery should be allowed to disable itself in perpetuity from performing its proper functions in respect of a certain subject-matter. If the principle suggested is sound the answer to such a question must be in the negative, and such indeed is the answer given by the English precedents.[55] When, however, the limitations imposed are on the form of legislation only it would again seem that the answer must be that the limitations will be good provided that they do not in fact amount to a substantial deprivation of power but merely relate to legislative method.[56]

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[52] De Jure Belli ac Pacis, Book II, Ch. XIV, *Of Promises, Contracts and Oaths*, xii 4 (Trans. F. W. Kelsey, 1925). See also Book II, Ch. XIV, XVII, where speaking of grants out of the Crown's bounty he says " Such grants cannot be revoked in relation to subjects but for the purpose of punishment or in the *public interest*, in the latter case with compensation if possible ".

[53] *Ibid.*, Book II, Ch. 14, § 7.

[54] Bynkershoek, *Quaestiones*, Book 2, Ch. 15. " Advice to the Ruler ", p. 292 (Carnegie Translation by Tenny Frank). " Finally let him [the Prince] keep in mind that the right of eminent domain must be exercised with prudence, not rashly abused, and it is an abuse of the right to use compulsion under it without adequate grounds or to take more than the public necessity or utility absolutely requires. But if he appropriates upon adequate grounds he will do so with the least possible harm to his subjects and upon payment of the price from the common treasury. He who convinces himself that he can act differently is a bandit rather than a prince ". Compare Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U.S. 393, " We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter route than the constitutional way of paying for the change ". Or Mr. Justice Van Devanter in *Perry* v. *U.S.* (1934), 294 U.S. 330, " Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence ".

This general principle seems moreover to have been acted on in other contexts and to be capable of resolving some apparent paradoxes. Thus in England, we find that at the same time that it is being laid down that no act can bind the King from any prerogative which " is sole and inseparable to his person but he may dispense with it *non obstante* ",[57] it is also said : " The King hath no prerogative but that which the law of the land allows him ".[58] A suggested solution is that these inseparable prerogatives were considered to exist for the " weal public " as in the *Case of Non Obstante*,[57] and that underlying the idea of the public good was some consideration of the requirements of official government for which the King was responsible.[59] These particular doctrines of the inseparable prerogatives are now discredited because of constitutional changes. They are here referred to since they appear to be an expression suited to one particular era of the principle claimed to govern public contracts.

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[55] Jennings, *Law and the Constitution*, p. 145 *et seq.*

[56] See, *e.g.*, *Att.-Gen. for New South Wales* v. *Trethowan*, [1932] A.C. 532, and see Prof. Friedmann's article in 24 *Australian Law Journal*, p. 103, where the same conclusion is reached by a different route. It should be observed that here even where a subsequent Parliament is not bound the validity of the original Act is unaffected until it is repealed.

[57] *The Case of Non Obstante*, 12 Co.Rep. 18. Another illustration of this principle is given in Judge Jenkins' *Eight Centuries of Reports* (1734), " The King by his grant cannot exclude himself from prosecuting any plea of the Crown; for it concerns the publick government and cannot be separated from his person ". Fourth century case XVIII quoted in Prof. McIlwain's *Constitutionalism—Ancient and Modern.*

[58] *The Case of Proclamations*, 12 Co.Rep. 74.

[59] It is for this same reason that we find Bodin urging that the public domain should be inalienable and that Fortescue in his *Governance of England* urges in Chap. XIX that the revenues should be inalienable.

This predominance of the public interest is similarly emphasized by Hale when, speaking of the alienation of navigable waters and of the creation of ports, he says that in the case of a market the King may not establish a rival whereas in the case of a port he may do so because " a port is of concernment to the whole trade of the kingdom and also the defence of the kingdom, the increase of shipping and the increase of the King's revenue which is of a common good to a kingdom ".[60] That is to say in a modern idiom that essential government purposes dictate a different treatment for two institutions which otherwise are similar.[61] A similar application of this principle is to be found in America,[62] and the distinction between regalia majora and regalia minora in Scotland again illustrates its working.[63] More recently the principle has been impliedly recognized in England in *Cory & Son, Ltd.* v. *City of London Corporation*[64] where the contract of the Corporation could not affect its powers of regulation as a health authority, and although the exercise of these powers rendered further performance of the contract commercially impossible it was not treated as a case of self-induced frustration. It has been expressly recognized in recent cases in Malta[65] and in Australia[66] where the English authorities were relied on.

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[60] Hale, *De Portibus Maris* (Hargraves Tracts) Ch. 5, see also *De Jure Maris*, Ch. 6, where Hale asserts that although the subject may own a navigable river still " the king hath yet a right of empire or government over it in reference to the safety of the kingdom and to his customs ".

[61] See also L. Ehrlich: " Proceedings Against the Crown, 1216–1377 ", *Oxford Studies in Social and Legal History*, Vol. VI, p. 41, " Among the attributes which were peculiar to the king we can distinguish two groups. The first group consisted of rights which could be granted by him to private persons . . . but there was a second class of royal prerogative 'ea quae iurisdictionis sunt et pacis et ea quae sunt iustitiae et paci annexa ad nullum pertinent nisi ad coronam et dignitatem regiam nec a corona separari poterunt cum faciant ipsam coronam. Huiusmodi iura sive jurisdictiones ad personas vel tenementa transferri non poterunt nec a privata persona possideri nec usus nec executio iuris nisi hoc datum feurit ei de super ', Bracton, fol. 55b. See also the case of *St. Albans*, quoted by Dr. Ehrlich from Tower Series F. 2 M. 23, where the King's Attorney required the revocation of a charter it being made " in perturbarcionem iuris et leges communis "—an infringement of the essential powers of justice necessarily inherent in the Crown.

[62] See, *e.g.*, *Illinois Central Ry. Co.* v. *Illinois* (1892), 146 U.S. 387, and the cases therein referred to.

[63] Erskine: *Institutes*, ii.3.III.

[64] [1950] 2 All E.R. 584.

Apart from these authorities it seems arguable that this necessity of preserving effective government is the underlying idea where Blackstone asserts[67]: " By the word prerogative we usually understand that special pre-eminence which the king hath over and above all other persons and out of the course of the common law in right of his regal dignity ". That is to say those additional powers which are requisite in the hands of the government over and above those proper to the subject and which because of their nature and purpose are not to be conferred upon a subject as such. Regarded in that way the prerogative is that " residue " of power which Chief Justice Taney claimed[68] must somewhere exist in any political organization, and which forms the basis of the present principle. The claim here is not however for any revival of royal prerogative as such, but rather for a continued recognition of the cause which resulted, at one stage of our devlopment, in those prerogatives. Our constitutional history has shown that what is the appropriate seat of ultimate power at one time and place is inappropriate at another when judged in the light of such matters as the spread of education, ease of communication, etc. It equally demonstrates, though, that at any given time this power must be found somewhere, whether it be in the Crown, in Parliament, in Ministers responsible to the latter or elsewhere.[69] Indeed the claims to discretionary power seem to have increased since that power was taken from an irresponsible king and vested in responsible ministers.

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[65] *Buttigeig* v. *Cross*, a decision of the Privy Council, hitherto unreported but referred to in *Current Legal Problems*, Vol. III, at p. 207 *et seq.*

[66] *Buchanan* v. *Redcliffe T. C.*, [1950] Queensland State Reports 24.

[67] 1 Com. 239.

[68] *Peirce* v. *New Hampshire*, 5 How. 554, at p. 583.

[69] Compare McIlwain, *Constitutionalism—Ancient and Modern*, p. 134 *et seq.*, on the effect of the Civil War and Revolution of 1688 in England. See also *Constitutional Dictatorship*, by Clinton L. Rossiter, Princeton University Press, 1948.

Before turning to the consequences of this principle of governmental effectiveness some limits to the present contention should be noticed.

There is in it a similarity with the theories of Duguit in that there is involved an abandonment of any doctrine of sovereignty as a basis for a discussion of the liabilities of the State. Writing in a country which has made a habit of at least attempting to abridge its sovereignty that is perhaps inevitable.[70] The abandonment is however based as much on the assertion that lawyers have not in fact used that doctrine in working out the relationship of the State to the individual, as upon the inherent vagueness and difficulties of the doctrine. There is however only a denial of sovereignty in an internal sense; its validity or utility as an international concept is not in question. Indeed, as has been shown, in an Austinian sense of the term the acceptance or denial of sovereignty is not involved. In contrast however to Duguit the present principle does involve the acceptance of the reality of governmental agencies and the recognition that, since they are created for special purposes they need to be endowed with special attributes or special privileges by law. It is impossible to eliminate the element of command from governmental action, and even judged by the illustrations he himself gives, it is difficult to concede the truth of Duguit's assertion[71] that "government action . . . has no special character". The recognition of this special character does not however necessarily deny or conflict with any claim for compensation from the public purse for the consequences of government action. Further, it is perhaps worth noticing that the doctrines of corporate personality, attacked by Duguit, are not here relevant. We recognize the existence of Parliament or of the Ministry of Health as instruments of government whether incorporated or not. The process of incorporation happens to be convenient in English law, particularly in relation to property, but it is by no means essential. The vesting of executive functions in an unincorporated committee of a local authority has no effect on the nature of its functions and the committee is as real a piece of machinery as the incorporated council. In England this distinction is perhaps most clearly seen with a borough, where all effective powers lie not with the Mayor, Aldermen and Burgesses, the incorporated body, but with the council.[72] Finally the acceptance of the present principle does not involve the acceptance of Duguit's "social function" as a universal criterion of the validity of laws. It depends rather upon a difference between public law and private law and insists upon different treatment for governmental bodies.

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[70] A strict adherent of the doctrines of sovereignty must find difficulty in admitting the validity of the process of establishing the self-governing dominions, or the formula of dominion status. It is of course arguable on the other hand that there has been no legally effective abandonment of sovereignty. See Viscount Sankey, L.C., in *British Coal Corp.* v. *The King*, [1935] A.C. at p. 520.

[71] *Law and the Modern State.* Translation Laski, p. 49.

There is it is suggested within these limits support, in theory, in history and in authority for this differentiation and for the principle set out. It remains to draw some conclusions from the latter.

THE CONTRACTUAL CONSEQUENCE OF THE PRINCIPLE OF GOVERNMENTAL EFFECTIVENESS

To concede that governmental action may, subject to conditions, override private rights including rights of individuals against the government, may seem merely to admit all the doctrines of sovereignty under another name. It may, therefore, well be asked whether the change from calling these special privileges sovereign powers is one of any substance. It would be one answer, if not a conclusive one, to say that any escape, even if only by means of terminology, from the confusions of the discussions of sovereignty would be welcome, but in truth the change does more than that. Three major consequences flow from the recognition of this principle divorced from the concept of sovereignty. The position of subordinate governmental bodies becomes clearer, the possibility of judicial review is admitted as also is the possibility of compensation where an individual suffers loss as a result of the operation of this principle of governmental effectiveness.

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[72] Local Government Act, 1933, s. 17.

It has already been emphasized that the problem here involved exists in regard to non-sovereign bodies. To treat powers of such bodies as local authorities as sovereign is logically impossible while sovereignty is considered to be inalienable,[73] but it cannot be denied that they are governmental organizations created for the purpose of government.[74] To the extent that their contracts debar them from pursuing the purpose of their creation they will not be binding,[75] in the sense already indicated, that is that they will not be directly enforced. Moreover, the increasing scope of the activities of public authorities through nationalization of industry is likely to produce similar cases in a much wider field. The difficulties of classification of these new bodies are considerable,[76] but it is thought that many of these difficulties may be circumvented by an application of the principle here claimed. It is obvious that for many purposes they must be treated as ordinary commercial undertakings yet all their purposes are not identical with those of such bodies. Any classification of the nationalized board itself is likely therefore to lead to difficulties when all the consequences are drawn from that classification. What is necessary is that the particular function concerned must be classified.[77] Thus, for example, in England the relationship of an Area Gas Board to its employees should be regulated by the ordinary principles of master and servant, whereas in fixing charges, in view of the monopolistic nature of the enterprise and of the radical economic changes which may be brought about by the alteration of rates, it is possible that the board should be regarded as exercising a governmental function with the freedom that that necessarily entails. Where rate fixing has been entrusted to an outside body, the Transport Tribunal or a public utility commission, this has been recognized, and the nature of the function does not alter merely because it is entrusted to an independent body. It may or may not be true that this latter method is a more efficient one for achieving the end desired but that does not affect the nature of the function performed. It will be noticed that here the emphasis is placed upon the fact that the function is governmental and not merely public.[78]

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[73] These powers may of course be so regarded if sovereignty is regarded as capable of delegation, see, *e.g.*, *S. of S. in Council of India* v. *Kamachee Boye Sahaba*, (1859), 13 Moo.P.C. 22, 46. This concept of delegation, however, only brings in its train further difficulties. What are really being spoken of are delegated powers of government.

[74] Thus we find the power of eminent domain treated as belonging to both the State and to the Federal Government in their own respective rights, *Kohl* v. *U.S.* (1876), 91 U.S. 376, which if the power is to be regarded as an attribute of sovereignty would entail again all the difficulties of two " sovereigns " with overlapping spheres within the same State. It is, however, obvious that this is a power which must be exercised by any governmental body of any significance. Thus, for example, powers of compulsory purchase although not exercisable directly by the parish in England may be used indirectly on its behalf by the county council. Local Government Act, 1933, s. 168.

[75] *Ayr Harbour Trustees* v. *Oswald* (1879), 11 Ch.D. 661, as explained in later cases, and *Cory & Son, Ltd.* v. *City of London*, [1950] 2 All E.R. 584.

[76] Cf. Professor Friedmann, " The new Public Corporations and the Law ", X. M.L.R., pp. 233, 377, or in M. Drago, " Les Crises de la notion de l'établissement publique ". In America the question is one of long standing, having arisen in relation to the taxation of Federal or State instrumentalities by the other. For the distinction between governmental and proprietary operations see, *e.g.*, *Ohio* v. *Helvering* (1934), 292 U.S. 360. For Federal activity see, *e.g.*, *New York Ex rel. Rogers* v. *Graves* (1936), 299 U.S. 401—the classification of the operation of the Panama Canal. See also *Helvering* v. *Gerhart* (1938), 304 U.S. 405, where the New York Port Authority was held not to be governmental. See however Note 78, *infra*, and *Allen* v. *Regents of University System of Georgia* (1938), 304 U.S. 439. For the ebb and flow of classification in this regard see Prof. Thomas Reed Powell, 58 *Harvard Law Review* (1945), pp. 663 and 757. These two articles admirably demonstrate the confusions which can arise from the classification of organizations for all purposes. The classification as governmental or proprietary is formally abandoned in *New York* v. *U.S.*, 66 Sup.Ct. 310, where the court appears to regard as critical the question of whether the tax impeded the State in the performance of its " sovereign duties ". Such a test avoids the difficulties

It may appear that what is here urged are the widest claims of despotic power or absolutism. Such indeed is not

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of classifying the agency and it would seem that these "sovereign duties" are in fact those essential government powers with which we are concerned. For similar operations see the cases involving the attempts of States to enlarge their Federal powers, *e.g.*, *Ashton* v. *Cameron County Water Improvement District No.* 1 (1935), 298 U.S. 513 and the other cases there discussed. See also Latham, C.J., in *Melbourne Corporation* v. *Commonwealth* (1947), 74 C.L.R. 31.

[77] This is the solution which was reached in relation to the East India Company.

[78] Thus in *Mersey Docks & Harbour Board* v. *Gibbs* (1866), L.R. 1 H.L. 93, the defendants could on this principle claim no special privileges, their duties although public not being in any sense governmental. This distinction between government and public purposes does in fact seem to have played some part in the decision of that case, see, *e.g.*, Lord Wensleydale, pp. 125–6, Lord Westbury, p. 128. Compare *Helvering* v. *Gerhart*, 304 U.S. 405, on the status of the New York Port Authority. In contrast to this case stand others where the regulations of such bodies as the New York Harbour Board have been held to fall within the police power and hence governmental.

so. The principle is simply that in the last resort the law permits a governmental agency to fulfil the fundamental purposes for which it was created, even though so doing may involve interference with vested contractual rights which an individual may have against that agency. This is only a surrender to absolutism or abitrariness if the particular constitution is framed to allow it, since the principle thus set out does not necessarily involve the proposition that that governmental agency which makes the claim must necessarily be judge of the validity of the claim. Where the latter is the case absolutism may result, but the intervention of judicial review of administrative action is a safeguard against arbitrariness. Indeed it is in fact not the least of the advantages which accrue from avoiding the doctrines of sovereignty that the way is left open for judicial review. So long as principles of sovereignty are involved it is the sovereign alone who can judge his actions.

Thus in America the police power, which is in truth the residual fundamental power of the States, rises above the contract clause and the Fourteenth Amendment, but the final arbiter of the validity of the claim to be exercising this power is the judiciary and not the legislature which makes the claim. Although therefore within its limits the power may be arbitrary in that the legislature is free to choose one means rather than another of correcting an evil, and is equally free to do nothing, yet the question whether or not the regulation can fall within the police power is one for the courts. Any exercise of it is therefore open to review. In this country the power of deciding whether the claim is justified is divided. Within limits the courts exercise a supervision. The courts are prepared to quash a compulsory purchase order if of the opinion that it is being used for a wrongful purpose.[79] Although it is true that in both countries the courts have been prepared at times to leave a wide range of discretion within which they will not interfere, nevertheless their power exists in the last resort. However, in England, behind this power of the courts lies the absolute power of Parliament. If Parliament had chosen to confiscate the development value of lands, to confiscate transport undertakings without compensation, it could in law have done so, and Parliament can equally dissolve a contract without compensation.[80] It is therefore true that here the only real security lies in such popular control of legislatures as a democratic constitution can allow and yet provide an efficient government. The choice of ultimate arbiter in this sense is dependent on the constitutional climate of the country concerned. No doubt there are dangers in our solution—risks of the abuse of Parliamentary powers; there are other dangers in the American solution—risks of unduly slowing down governmental action. The truth is that in constitutions, as in life, reasonable risks must be taken. The choice of risk is dictated by history and the circumstances of each community but once the principle of sovereignty is removed at least the possibility of control is admitted.

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[79] *Sydney Municipal Council* v. *Campbell*, [1925] A.C. 338. It is true that the limits within which the courts will in practice exercise this power are somewhat narrow. See, for example, *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning*, [1950] 2 All E.R. 765 which indicates the difficulties of proof which will face the opponent of such an order.

As it is phrased the principle of governmental effectiveness only operates, and is only intended to operate, in extreme cases. The pre-eminence of the principle of public service is not absolute and there is implicit in it an acceptance of private rights. These are in the last resort to be overridden but the presumption is in their favour. In practice the priority of private rights should be recognized by the fact that where their surrender is required compensation is payable. This is so in regard to the exercise of the power of compulsory purchase here, the power of eminent domain in America or the power in France to revoke or suspend a concession granted by the administration. To allow this compensation is at the same time to admit that private rights do not exist solely as tenants at will of the community. The close relationship between the present principle in relation to contracts and the power of eminent domain has already been noticed and should therefore lead to the conclusion that compensation should be payable here too. That possibility is more readily acceptable once any concept of sovereignty is removed.

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[80] *A.-G.* v. *Great Southern and Western Rly. of Ireland*, [1925] A.C. 754, a compulsory assignment. Compare the treatment of monopolies under the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, with their treatment in America,

Moreover it has already been contended that the existence of this overriding power does not entail the initial invalidity of the contract made by the public authority. The statute which in England purports to bind future Parliaments is not any the less law until it is repealed. In the same way the grant of a monopoly in America is effective during its currency even though it may be repealed[81]; the same is true of a lottery licence.[82] The recognition of this fact increases the theoretical justification for compensation which has been advanced. To deny enforceability to public contracts under the present principle is then to assert no more than that, even where normally available, the remedies of specific performance or injunction or their equivalents are ruled out by the principle of governmental freedom of action. Compensation is not thereby necessarily also eliminated,[83] since it is the performance of, or abstention from, a particular act which is obnoxious to the general rule and not the payment of money. Rarely, as has been shown, the payment of compensation may itself offend.

The result of the general principle here advanced is therefore that the public authority may be exempt from performing its contract according to its strict expression but that where this exemption results in loss to the individual contractor compensation should be payable save where that payment would offend the principle. Such cases would arise only where the burden of payment would be such that it could not be borne by the public authority.[84] It must be admitted that the suggestion of compensation is not at present well supported by the authorities. Compensation was denied in *The Amphitrite*.[85] In America it is only payable if there is a "taking" so that the power exercised is properly to be regarded as that of eminent domain and not, for example, of the police power.[86] Although this distinction may frequently have the same result as the application of the principle here urged, it is not always satisfactory.[87] On the other hand the suggestion of compensation is not without support; there is, for example, the requirement of restoration in *The case of Saltpetre*[88] and other dicta in *Att.-Gen.* v. *De Keyser's Royal Hotel*[89] tend equally to support it. Even if the rules as to compensation may be uncertain, the possibility of it is strengthened by the recognition of some such principle as that here advanced.

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[81] *The Slaughter House Cases* (1872), 16 Wall. 36.

[82] *Douglas* v. *Kentucky* (1897), 168 U.S. 488.

[83] In *Buchanan* v. *Redcliffe T.C.*, [1950] Q.S.R. 24, the claim for compensation is left open. See 24 *Australian Law Journal*, p. 66.

Despite uncertainties it seems important to urge the recognition of the fact that the contracts of governmental agencies cannot always be governed by the same rules as those which regulate contracts between individuals, and that consideration should be given to the problem in view of present trends which seem likely to enhance its importance. Hitherto in England problems of public law have largely been considered in relation to administrative adjudication and legislation. In truth the proper adjustment of the rights of the individual and the State is not confined within such limits and the proper protection of both seems unlikely to be achieved solely by the application of private law rules to matters for which they were not designed. Particular rules having the specific character of public law are desirable and probably essential. Here the attempt has been made to examine the background of one particular topic with this in view. In any such attempt it is believed that much is to be learnt from the study of other systems such as those of France and the United States which are based upon a philosophy of life which is fundamentally similar to our own but in which, because of differing circumstances, much greater attention has been paid to these issues. This comparative lack of English authority should not, however, be taken as a measure of the importance of the problem, since it is believed that a refusal to consider the special position of governmental bodies may be as dangerous to individual rights as to the community as a whole. Where fact and law are too much out of joint injustice is likely to result. In this particular context that consequence can be avoided by the recognition in law of that special position of governmental agencies which in fact exists.

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[84] Cf. note 49, *ante*, as to the denial of compensation for loss suffered by alteration of the general law. It is conceived that the rules governing compensation must be general and that the test must be the general consequence of allowing compensation in one type of interference with contract rather than the consequence in the particular case. Compare Simonds, J., as he then was, in *Re Caborne*, [1943] Ch. 224, 231, where discussing public policy he says, "In these matters the law looks not to the possibility of public mischief occurring in the particular case but to the general tendency of the disposition".

[85] [1920] 3 K.B. 500.

[86] *Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U.S. 393. The development of the application of the principles of frustration, as in *William Cory & Son, Ltd.* v. *London Corporation*, [1950] 2 All E.R. 584, could here give at least partial relief.

[87] See for example *Northwestern Fertilizer Co.* v. *Hyde Park* (1879), 97 U.S. 659.

[88] 12 Co.Rep. 12.

[89] [1920] A.C. 508. See also *France, Fenwick & Co., Ltd.* v. *R.*, [1927] 1 K.B. 458, 467. The compensation for requisition is long established, as for example the case reported Rot. Parl. 9, Ric. 2. Vol. 3, p. 212. In contrast stands the statement of Lord Parker in *The Zamora*, [1916] 2 A.C. 77, 100, denying compensation to the subject for requisitioning. It is, however, arguable that the statement is *obiter*.

J. D. B. MITCHELL.

RECENT LEADING CASES

By Andrew Rankin, B.A., B.L., of the Northern Circuit, Barrister-at-Law

FACTORY— "Place" used for purposes other than processes carried on in factory—Repair of plant used in factory—Factories Act, 1937, ss. 14 (1) and 151 (6).

In *Thorogood* v. *Van Den Berghs*, [1951] 1 All E.R. 682, the Court of Appeal considered section 151 (6) of the Factories Act, 1937, and the recent Scottish decision, *Parvin* v. *Morton Machine Co., Ltd.*, 1950 S.C. 371. As a result of this decision section 151 (6) must be construed as if it read "When a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes [for or incidental to the main purpose of the factory] that place shall not be deemed to form part of the factory for the purposes of this Act . . .". In considering whether the repair shop came within the provisions of that subsection, Cohen, L.J., held that Rating Acts cases are binding in cases brought under the Factories Act, 1937, if the rating case proceeded under those sections of the 1907 Factory and Workshops Act which do not differ in material respects from corresponding sections of the 1937 statute. In view of the finding of the Court on the provisions of section 151 (6) it was not necessary to consider the authority in England of *Parvin's Case*. Nevertheless, Cohen, L.J., pointed out that had it been necessary to consider it he would have followed *Parvin's Case* as being correctly decided, and applicable in English law.

FACTORY— Safe means of access—Factories Act, 1937, s. 26 (1).

Although an appeal to the Divisional Court from the decision of a bench of justices, *Dorman Long* v. *Hillier*, [1951] 1 All E.R. 357, is a useful authority on section 26 (1) of the Factories Act, 1937. The legal issue in the case was whether there was a failure to provide a safe means of access under that section as distinct from a failure to provide a safe place of work. The justices were of the opinion that the case was covered by Denning, L.J.'s, decision in *Whitby* v.

Burt, Boulton and Haywards, Ltd., [1947] K.B. 918, but as a result of the decision of the Divisional Court some doubt has been cast on the correctness of that decision. Lord Goddard, C.J., pointed out that when *Whitby's Case* was decided *Hopwood* v. *Rolls Royce, Ltd.* (1947), 176 L.T. 514, was not cited to the learned judge. This case had not been reported but it was decided by the Court of Appeal several weeks before *Whitby's Case*. In *Hopwood's Case* Lord Greene, M.R., gave some guidance as to the distinction between a means of access and a place of work. He said " There must be a safe means of access to the particular branch of the man's work on which at the moment he is about to engage himself. That would exclude movements taken while doing one operation or one set of operations, and would confine the section [section 26 (1)] to cases where it can truly be said that if a man is moving from one branch of his work to another branch of his work, his route in doing so is a means of access ".

Devlin, J., in dealing with this distinction pointed out that a place can never be at the same time a means of access and a place of work. " It seems to me that if it can be held that a place may be at one and the same time a place of work and a means of access, then it is necessary to see for which purpose it is being used, or may require to be used, at the material time."

MASTER AND SERVANT—Provision of safe system of working—Dermatitis contracted through use of synthetic glue—Protective cream kept in store but not in workshop.

Whether the employer has failed in his duty to provide a safe system of work is a question of fact and cases which proceed on that basis are numerous. Nevertheless *Clifford* v. *Challen & Son, Ltd.*, [1951] 1 All E.R. 72, is of some importance to employers of labour engaged in processes likely to cause skin diseases. In that case the plaintiff was employed by manufacturers of radio sets and of pianos. In this work he used a synthetic glue which had special advantages over other glues but which was likely to produce dermatitis if it was allowed to dry on the skin. The plaintiff did contract dermatitis and he alleged that the defendants failed (a) to provide him with a " barrier cream " and (b) to provide running water for him to wash with.

In the factory the barrier cream was kept in a store and it was left to the workman to fetch it from the store if he wished.

By so providing it, had the employers discharged their duty to the plaintiff? Cohen, L.J., held that they had not and observed "Where an employer is making use of a dangerous process, it is not enough for him to have available somewhere in the factory the appliances necessary to minimise the danger. The system of working must be one in which the appliances are available at the place where they are needed, and the man in charge of the work should be responsible for seeing, so far as he can, that the workers make use of the appliances provided".

NEGLIGENCE —Claim in document excepting liability—Innocent misrepresentation as to extent of exception clause—Cleaner and dyer.

Cases on printed forms emphasise that when it is desired to exempt oneself from a liability which the common law imposes, it can only be done by an express stipulation brought home to the party affected and assented to by him as part of the contract. Moreover if the party affected signs a written document knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses unless the signature is shown to be obtained by fraud or misrepresentation—*L'Estrange* v. *Graucob*, [1934] 2 K.B. 394. The issue in *Curtis* v. *Chemical Cleaning and Dyeing Co.*, [1951] 1 All E.R. 631, was—what is a sufficient misrepresentation to take the case out of the principle of *L'Estrange's Case*?

Denning, L.J., held that "any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation. But either is sufficient to disentitle the creator of it to the benefit of the exemption".

In *Curtis' Case* the plaintiff took to the defendants a white satin wedding dress for cleaning. The plaintiff was asked to sign a document which contained a clause exempting the defendants from any damage, however caused. Before she signed this document the plaintiff asked why she had to sign it and she was told by one of the defendants' servants that the defendants would not accept any liability for damage done to beads or sequins on the dress. The plaintiff then signed the document without having read all of it. When the dress was returned there was a stain on it which was not there when the dress was left by the plaintiff. In an action against the defendants they relied on the exception clause.

It was held in *R.* v. *Kylsant* (*Lord*), [1932] 1 K.B. 442, that a representation might be literally true but practically false, not because of what is said, but because of what it left unsaid. As Denning, L.J., observed "In short because of what it implied. . . . When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or, at any rate, not so wide an exemption as that which is in fact contained in the document". In *Curtis' Case* the assistant failed to draw attention to the width of the exemption clause and thereby created a false impression, and that was a sufficient misrepresentation to disentitle the defendants from relying on the exemption, except in regard to the beads and sequins.

RECENT PRIVY COUNCIL CASES

By Colin Clayton, of the Middle Temple, Barrister-at-Law

INSURANCE—
Accident—
Explosion.

Boiler Inspection and Insurance Company of Canada v. *The Sherwin Williams Company of Canada, Ltd.* ([1951] 1 T.L.R. 497) was an appeal from a majority judgment of the Supreme Court of Canada in an action in which a claim was made under the terms of an insurance policy which the appellants issued in favour of the respondents covering a period from March 15, 1940, to March 15, 1943. The risks insured against were "loss . . . from an accident as here defined . . . to an object described herein". Section 1 of the policy stated: "To pay the assured for loss on the property of the assured directly damaged by such accident . . . excluding (*a*) loss from fire (or from the use of water or other means to extinguish fire); (*b*) loss from an accident caused by fire . . . (*e*) loss from any indirect result of an accident". An accident was defined as follows: "'accident' shall mean a sudden and accidental tearing asunder of the object or any part thereof caused by pressure of steam, air, gas, water or other liquid therein, or of the sudden or accidental crushing inward of the object or any part thereof caused by vacuum therein; and shall also mean a sudden and accidental cracking of any cast-iron part of the object, if such cracking permits the leakage of said steam, air, gas, water or other liquid, but leakage at valves, fittings, joints or connections shall not constitute an accident".

Among the objects covered by the insurance was a steam-jacketed bleacher tank, which was situated on the third floor of the respondent's linseed oil mill. While the tank was being used to bleach turpentine internal pressure blew off the tank door and permitted a large body of gas to escape. The vapours so escaping mixed with the air, eventually became ignited in some way, exploded and shattered a large portion of the building. The greater part of the damage was attributable to a fire which followed the explosion, or to damage from water made use of to put out the fire, which the respondents accepted as being excluded from the claim against the appellants because of the wording of section 1 of the policy. The amount attributed to causes other than fire damage, and said to be covered by the policy, was, after adjustment, $45,791.38, which was the sum claimed in the action.

The appellants contended, *inter alia*, that the loss was not caused by an accident as defined in the policy, but by the subsequent explosion; and that in any case it was due to fire—the unexplained source of ignition—which, so far from being covered, was expressly exempted by the terms of the policy.

The Board stated that the *causa proxima* in insurance law did not necessarily mean the cause last in time, but what was in substance the cause determined by common-sense principles. When considering only whether the explosion was the direct result of the tearing asunder of the tank, and disregarding the question whether the exception of fire from the risk freed the appellants from liability, it mattered not that the escaping fumes required to be mixed with air before they became explosive or that some source of ignition was required. Both those steps were the natural, indeed almost the inevitable, consequence of the original rupture, and therefore its direct result. There remained the more difficult question whether the exclusion of loss from fire prevented the respondents from recovering. The incident from the moment when the first flash was observed until the ultimate explosion took place was all part of one momentary event. There was no appreciable moment of time between the beginning of the ignition and the explosion. Each was a part of the same event, the ignition being the first and the explosion the final stage of the disaster. The fact that ignition, and in that sense fire, was an element in the ultimate result was not destructive of the respondents' claim. The cause of the explosion, whether described as dominant or proximate, was the bursting open of the door of the tank, and it would be an unjustified view to hold that one of the sources of ignition always present in a factory was in substance the cause of the explosion. In the result, the appellants were held not to be absolved from liability under the policy for the damage due to the explosion by reason of the exception of fire.

Another question, which the Board decided first, since it went to the root of the matter and challenged the respondents' right to recover at all, was whether the claim was any longer maintainable since they had already been paid by the fire insurance companies the whole of the loss suffered, and had assigned their right, title and interest in their claim against the appellants to the fire insurance companies. Section 1570 of the Civil Code provided: " The sale of debts and rights of action against third persons is perfected between the seller and buyer by the completion of the title, if authentic, or the delivery of it, if under private signature ". By section 1571: " The buyer has no possession against third persons, until signification of the act of sale has been made, and a copy of it delivered to the debtor. He may, however, be put in possession by the acceptance of the transfer by the debtor, subject to the special provisions contained in article 2127 ". By article 77 of the Code of Civil Procedure: " No person can bring an action at law unless he has an interest therein. Such interest, except where it is otherwise provided, may be merely eventual ". Article 81 provided: " A person cannot use the name of another to plead, except the Crown through its recognized officers ".

The Board referred to the facts on this issue and stated that they could not accept the view that proof of payment by the fire insurance companies and of the transfer of the debt from seller to buyer was a sufficient signification of the act of sale within the meaning of section 1571. Signification implied an act on the part of the buyer or seller, as opposed to acceptance of the transfer by the debtor, whereby the buyer was enabled to sue him. Here there was no act by buyer and seller and therefore no signification by either. It was true that payment in full had been made, not, however, because the fire insurance companies admitted any liability, but because it was doubtful on whom the liability fell. As between the appellants and the respondents the debt was still due to the latter, and by the very terms of the transfer they were under an obligation to continue the action or allow it to be continued in their name. They would have been in breach of their contract had they not done so: it was still *their* action, and the fire insurance companies were not using the respondents' name to plead. The Board accordingly held that that plea could not prevail.

WILL—Construction—Residuary Gifts on Trust.

In *McDonnell and Others* v. *Neill and Others* ([1951] 1 T.L.R. 642), the appellants appealed from a judgment of the High Court of Australia in an action which raised a question of construction of the will of a testator who died in June, 1904, and was survived by two daughters. The testator devised and bequeathed the residue of his real and personal estate on trust " for my said two daughters G. and E. for life in equal shares with remainder in fee to their issue in equal shares their grandchildren if any taking *per stirpes* ". G. had three children and E. one. E. died in 1937 and G. in 1948. After the death of G. the trustees of the will took out an originating summons for determination of the question whether the corpus of the residuary estate was divisible equally *per stirpes* or *per capita* among the children of G. and E. respectively. The Judge in the Supreme Court of New South Wales came to the following conclusion : " In the result, and viewing the gift as a whole, I think what the testator intended was a gift to the issue of his daughters in equal shares *per capita*, any question of stirpital division being postponed until the generation of grandchildren of daughters and grandchildren then taking stirpitally in substitution for, and not in competition with, a parent ". From that decision the child of E. appealed to the High Court of Australia, which allowed the appeal. The children of G. appealed, and the Board held that on the true construction of the will there was a trust of one moiety for G. for life with remainder to her issue, and a trust of one moiety for E. for life with remainder to her issue. Stress had been laid on the fact that the gift over of corpus was not expressed to take effect " at " or " upon " the " death " or " deaths " of the life tenant or life tenants. But, the Board stated, the words " with remainder ", written large, meant " with remainder on the determination of the precedent life estate " and pointed as clearly as did the words " at the death " to the same point of time. The appeal was accordingly dismissed. SUMPTON *v.* DOWNING ((1947) 75 C.L.R. 76) was distinguished.

CURRENT PERIODICAL LITERATURE

By K. W. B. MIDDLETON, B.A., LL.B., Advocate

THE LAW QUARTERLY REVIEW

The January, 1951, number of the *Law Quarterly* marks the beginning of the second quarter-century of Professor Goodhart's editorship; and Lord Wright contributes some lines drawing attention to the occasion. As he says, the Notes, which are the particular province of the editor, form the special characteristic of the *Law Quarterly* and the most valuable part of each number. It is impossible to read them in sequence without being struck by the vigour and common-sense attitude to the law of the editorial comment. Lord Wright quotes as typical one or two of the Notes in past issues, and the present issue contains others as admirable.

Professor Goodhart has never been one of those who favour a narrow construction of statutes, and accordingly it is not surprising to find him commending two recent decisions of the Court of Appeal, where a liberal interpretation was adopted. In *Sir Lindsay Parkinson & Co., Ltd.* v. *Commissioners of Works*, [1949] 2 K.B. 632, the Court of Appeal refused to interpret literally a provision which appeared to allow the defendants to call on the plaintiffs for an unlimited amount of work, while the remuneration was fixed at a limited sum. " Only the most compelling language ", Asquith, L.J. said, " would induce a Court to construe the combined instruments as placing one party so completely at the mercy of the other ". Again, where an agreement contained a provision that it was to remain in full force and effect until such time as a certain Order made in 1943 was cancelled, and the Order was not in fact cancelled, the defendants were held entitled to terminate the agreement, on the ground that it had never been contemplated by the parties that the Order of 1943 would apply in entirely different circumstances (*British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.*, [1950] 2 All E.R. 390).

On the other hand, the Court of Appeal earns bad marks for two cases that arose under the Factories Act, 1937. In one of them, *Burns* v. *Joseph Terry & Sons, Ltd.*, [1950] 2 All E.R. 987, the majority (Denning, L.J., dissenting) held that a machine was securely fenced within the meaning of the Act, if the fencing removed the possibility of injury to anybody acting in a way a human being might reasonably be foreseen to act. Professor Goodhart points out that there is no express reference in the statute to foreseeability as the proper test, although a careful draftsman might have been expected to include such a reference if it was intended to restrict the effect of the apparently absolute terms of the statute. His main criticism, however, of the majority decision in this case is directed against the principle of construing such a statute as the Factories Act narrowly, because it is a statute imposing penalties on employers, instead of having regard to its purpose, namely, to protect workers against accidents. An Act which purports to lay down a code of behaviour designed to give protection to the factory workers cannot be drafted as precisely as a criminal statute, and therefore if every ambiguity is to be solved in a narrow manner by the Courts the Act may lose much of its efficacy and a potent weapon may be given " to those who wish to substitute administrative tribunals in the place of the ordinary Courts ".

By way of contrast, the Divisional Court in *Corkery* v. *Carpenter*, [1950] 2 All E.R. 745, applied section 12 of the Licensing Act, 1872, which strikes at persons drunk in charge of " any carriage " on a highway, to a drunk man pushing a pedal cycle along a road, having regard to the object of the Act of 1872, namely, to protect the public and preserve public order. The same Court in *Garner* v. *Burr*, [1950] 2 All E.R. 683, held that an empty poultry shed fitted with four bogie wheels to draw it along the highway was a vehicle within the meaning of section 1 of the Road Traffic Act, 1930, the Act being clearly aimed at anything that will run on wheels, whether or not conforming to the dictionary definition of a vehicle. In both these cases, the editor of the *Law Quarterly* observes, there was an obvious ambiguity which ought to have been solved by a narrow interpretation if it is a fixed principle that " a man is not to be put in peril upon an ambiguity ", even in cases where the narrow interpretation is in conflict with the general purpose of the Act. Unlike the Court of Appeal, the Divisional Court has rejected that view. " This leads to the strange result that where the Act is designed ' to protect road surfaces ' it will be given ' a generous construction ', but where the Act is designed ' for the protection of the life and limb of certain workers ', it must, if reasonably possible, be narrowly construed so as to avoid the penalty ".

If Courts always adopted the principle of construing penal provisions strictly, there would be something to be said for it on the ground of certainty. But they are not prepared to adopt it consistently. It is probably true to say that in the great majority of instances they follow the opposite course, and only fall back on a strict construction when they are in want of a better argument for deciding a case in a particular way. As Maxwell in *The Interpretation of Statutes* remarks, the rule of strict construction, vigorously applied in former times when the number of capital offences was very high, has lost much of its importance in recent times, and it is now recognized that the paramount duty of the judicial interpreter is to put upon the language of the legislature its plain and rational meaning and to promote its object. That being so, to invoke the rule of strict construction nowadays, apart from other objections to it, is to produce confusion. It is true that there are dangers in the opposite principle of liberal construction. Judges may be led to substitute their own ideas of what a statute ought to mean for what they think the legislature intended to express. Their duty is to decide what the legislature says, not what it should say. But liberal interpretation is not necessarily the same thing as lax interpretation. The real difficulty arises less from the need of choosing between a liberal and a strict construction than from applying a different principle to penal, and certain other, statutes on the one hand, and to ordinary statutes on the other hand. There does not appear to be any longer a sufficient reason for the distinction, and it is one that can only be maintained at the price of inconsistencies such as those pointed out by Professor Goodhart.

HEARSAY EVIDENCE

Probably few legal rules are at once so familiar and so peculiar to a layman as the rule excluding hearsay evidence. It is, of course, obvious to any sensible person that a witness is likely to give a better account of what he has himself perceived than of what he has learnt from somebody else. It is not necessary to go to a lawyer to recognize the truth of that. What, however, is not so obvious is the reason why a witness should not be allowed to give, or a jury to hear, second-hand evidence for what it is worth. The customary argument that hearsay evidence ought not to be allowed, because it cannot be tested by cross-examination and nobody can say what effect it might have on a jury, perhaps does less than justice to most jurymen nowadays. Nor does it make sense as applied to a judge sitting without a jury. If a clear-cut distinction could always be drawn between facts which a person speaks to of his own knowledge and facts which are derived from somebody else, the rigid exclusion of hearsay would be easier to justify. But in practice it is often very difficult, even for an honest witness, to make the distinction in his own mind. Moreover, the truth or falsehood of a statement cannot always be separated from the quite different consideration of the relevance of the statement, as showing, for example, that a certain fact came to the knowledge of the witness at a certain time. But it may not be possible to admit the statement for the latter purpose without inviting an inference as to its intrinsic truth or falsehood.

In spite, however, of the difficulties which a complete exclusion of hearsay evidence involves, there are solid grounds for the rule, and it is inconceivable that it should be abolished, at least so long as juries exist, in Anglo-Saxon countries. The law must have regard to the least intelligent juryman, and even the average member of a jury might be only too ready at times to attribute more importance to a reported statement than it deserved. Besides, the rule has the beneficial effect of enabling attention to be concentrated on the essential evidence to the exclusion of that which is of remote or doubtful relevance. On the whole, the advantages of the rule no doubt outweigh its disadvantages. The discredit into which the system of jury trial has fallen on the Continent, after a hundred years or so of experiment, may be due, among other things, to failure to appreciate the value of the rule.

Mr. H. A. Hammelmann, writing in the same number of the *Law Quarterly Review*, points out the curious fact that, while in this country the rule excluding hearsay evidence was not universally accepted and strictly enforced until the middle or late eighteenth century, on the Continent the development was in the opposite direction. Thus in France, before the Napoleonic codes, verbal hearsay evidence could only be received by the Courts in exceptional circumstances, whereas now the fundamental principle is that the law will not in general restrict or otherwise interfere with the assessment of the persuasive value of any instrument of proof. This does not mean that the inferiority of hearsay is not recognized, but, where its relevance can be shown, evidence that would clearly be excluded in this country is habitually admitted. A public rumour, for instance, implicating an accused person may legitimately be spoken to by a witness for the prosecution in a French criminal trial. In Germany it is left to the Courts to decide in each individual case whether the potential danger inherent in a second-hand, or third-hand, report amounts in the particular circumstances to a real danger. If it does, then the Court has power to call the immediate witness. Even in the conditions of jury trial, Mr. Hammelmann declares, Continental lawyers have arrived at the almost unanimous conclusion that a strict rule barring hearsay evidence would be both undesirable and unnecessary, and that hearsay presents no serious problem with which judges, or juries, are unable to cope.

He agrees with Professor E. M. Morgan that the contrast between the Continental and Anglo-Saxon attitudes to hearsay is closely linked with the different functions of the judge. Where the adversary system of trial prevails, as in Anglo-Saxon countries, and cross-examination is a matter for the opposing parties, the admission of hearsay is more objectionable than in countries where the inquisitorial system prevails. There both examination-in-chief and cross-examination are largely conducted by the presiding judge, so that the risk of prejudice arising from the admission of hearsay is within his control. It is possible that this contention has some substance in it, but it hardly appears to account for the striking contrast between the two systems. It is more natural to conclude that the jury has been introduced on the Continent without a proper understanding of the conditions in which jury trial can successfully operate.

Periodicals also received: *Oklahoma Law Review, Connecticut Bar Journal, Law Journal, Revista Juridica de la Universidad de Puerto Rico, Canadian Bar Review, American Journal of International Law, La Justicia, Informacion Juridica, Revue Internationale de Droit Comparé, Revista del Foro, Lima, Peru, New York University Law Review, Modern Law Review, Revista de la Escuela Nacional de Jurisprudencia, New Jugoslav Law.*

RECENT LITERATURE

The South African Law of Obligations. By R. W. Lee, D.C.L., F.B.A.; A. M. Honoré, B.C.L., B.A., (Editors), and L. R. Caney, K.C.; Hon. T. E. Dönges, K.C.; Hon. F. A. W. Lucas; and R. S. Welsh. 1950. Durban: Butterworth & Co. (Africa) Ltd. Price 50s. net.

It is becoming increasingly plain that there are two things which are urgently needed by the Law of Scotland at the present time. The first is the creation of a school of academic law. For generations the Faculty of Advocates and the Legal Societies were able to produce from their own ranks a succession of distinguished scholars whose published works illuminated and enriched our system and guided its further development. But times have changed. Our potential jurists are forced by sheer pressure of circumstances to concentrate upon the earning of professional fees. Even were they free to lift their eyes to the wider horizons, the cost of book production for a limited market has all but barred their progress along the road which their fathers trod. Some method must be found to overcome these difficulties, and found quickly, if our system is not to languish and slowly die, to the permanent loss of world jurisprudence. England, France and the United States—to mention only three cases—have established and are fostering powerful schools of academic law, and the academic lawyers of France and the United States have recently begun to take an active interest in Scotland's distinctive contribution to law. But in Scotland law is becoming a vocation and nothing more—taught as a trade, learned as a trade and practised as a trade—and this fatal trend must at all costs be checked.

The second requirement (and it is associated with the first) is a revival amongst Scots lawyers of the fertilising foreign contacts which throughout the formative period of Scots law provided the source of inspiration for so many of the distinctive features of our eclectic system. The starting point must be the organised teaching of comparative law in our universities, and in this field Aberdeen has taken a lead which the others would do well to follow. English law is less than useless for this purpose, for we have no basic affinity with English law, and to yield to the steady pressure from the South would only mean the submergence of Scots law in English and the rapid loss of Scotland's legal identity. The contacts which are required are contacts with the modern systems which, like our own, are founded on the Romanist tradition, and which are developing in obedience to the Romanist method of legal thinking.

It is impossible to pursue any further these random reflections, which were inspired by the reading of this remarkable book—remarkable in its origin, scope and purpose. Two Oxford academic lawyers (one a civilian and comparative lawyer of international repute), with the active co-operation of the Judge-President of the Cape Division of the Supreme Court of South Africa, have conspired with a South African Judge, three South African King's Counsel and a South African Advocate to produce by joint effort a codification of the civil law of South Africa in two volumes, of which the first is now before us. The enterprise is thus an experiment on the factory scale, demonstrating a partnership between the academic and the practising lawyers in the field of comparative law; for the sources drawn upon include the civil law, the French, German and Dutch Civil Codes, English law and South African law—but unfortunately not Scots law. The area of investigation is wider than the title would suggest, for it covers, in addition to the general law of contract and the particular contracts with which we are all familiar, the field of quasi-contract and delict and a great deal of the law of persons and of private international law. The method of treatment is similar to that employed in Jenk's *Digest of English Civil Law* and Dicey's *Conflict of Laws* and further exemplified in the American *Restatement of the Law*, and consists of numbered propositions, formulated with the utmost precision and scientifically classified and arranged, followed by brief citations of authorities and explanatory notes. It is easy to see the special skill of the academic lawyers on every page.

This book would make an admirable textbook for advanced law students in our universities, for it would meet in some degree both of the needs referred to above. It would also be a most educative guide to the practising Scots lawyer who is not content to snatch his law superficially from the handiest textbook but is conscientious enough to penetrate to principle. For here we can see a legal system, which started from very much the same point as did Stair, and which has since grappled with all the modern problems which perplex us, and has worked out sometimes the same, and sometimes quite different, solutions. The kinship between Scots law and Roman-Dutch law is so close that the modern Scots lawyer will find himself perfectly at home in this book—far more so than in many standard English works—for the terminology and the idiom of legal thought are founded four-square, as our own are, upon the civilian tradition.

Would it not be possible for Scotland to follow the South African example? Our institutional works and our modern textbooks and encyclopædias have their place, but they are not filling a felt need of two kinds—the need for a scientific and philosophic presentation of our basic principles in the form they have now attained for the purpose of clarifying our legal thinking and providing a fresh starting point for further development; and the need for making Scotland's contribution to world law known abroad, especially to the academic lawyers of Harvard and the Sorbonne, who have been asking for something which meantime we cannot offer. The bench, the bar, the legal societies and the universities could be counted upon to give their enthusiastic co-operation. But the academic lawyers would be indispensable for such a task, and some at least should be drawn from outside Scotland, so that the Scottish Restatement might be expressed in the form and in terms appropriate to the comparative jurisprudence of the world. Oxford, Cambridge, Paris, and several of the great universities of the United States possess many scholars well qualified to assist whose services might be invoked.

After all there is now hardly a civilised community in the world whose law is not either officially or unofficially codified, with the single exception of Scotland. An unofficial codification of Scots law would unquestionably be a very valuable contribution to world law. Should we not attempt it on the model of a book such as this?

Private International Law. Second edition. By Martin Wolff. 1950. Oxford: Clarendon Press. Price 35s. net.

The author's foreign training enables him to approach the subject of English Private International Law with a knowledge of Continental systems of Private International Law, and his statement of an English rule is usually accompanied by an interesting comparison with the corresponding rules in other countries. This makes his book valuable to the person who wishes to study the subject deeply, and in those cases (not infrequent) in which our rule is shrouded in doubt, it will supply the practitioner with material for a "guid gangin' plea". The practitioner who wishes merely to be informed of our rule and our authorities, however, will probably never use the book to the same extent as the orthodox Dicey. Scots lawyers may be forgiven for having some doubts about the author's reliability when they read at p. 3:—

> "Example: A German domiciled in Scotland dies intestate, leaving a widow and a brother: his moveable property is worth £10,000. Under German law his widow succeeds to half the estate, under Scots law she can only claim a sum of £500 . . .".

The same error appeared in the first edition.

The chapters on "Nationality as a point of contact", "Apparent identity of points of contact", and "Fraudulent creation of points of contact" are illuminating because of the freshness of their viewpoint. Unfortunately the chapter on "Classification", where one would have expected the author's knowledge of foreign systems to have been of inestimable help, contains the same inconsistencies as in the first edition.

He considers, first, Bartin's theory that classification should be according to the law of the forum, and rejects that; next, Beckett's argument that classification should be according to the principles of comparative legal studies and analytical jurisprudence, and rejects that also. He then advances his solution, that every legal rule takes its classification from the system to which it belongs. However, the manner in which this would work out in practice may be illustrated from the facts in *Re Cohn*, [1945] Ch. 5:

Two ladies, a mother and a daughter, both domiciled in Germany, were killed in a common calamity in London, and it was uncertain who had survived the other. If the daughter survived her mother, she was entitled to property under her mother's will. A rule of English law, s. 184 of the Law of Property Act, 1925, provided that they should be presumed to have died in order of seniority, while the German Civil Code said that they were presumed to have died simultaneously. If the judge had classified each rule of law according to the law of which it was a part, he might conceivably have found that English law classified the English rule as matter of evidence, in which event the English rule should apply because the *lex fori* governs evidence, and that German law classified the German rule as matter of substance, in which event the German rule should apply because the *lex domicilii* governs the substance of rights of succession. In short, both the English and the German rule would apply, which is impossible. Alternatively, if English law had classified the English rule as relating to substance, and German law had classified the German rule as relating to evidence, neither rule would have applied.

A similar difficulty may arise from this method when the Court seised of an action on a debt is faced with two statutes of limitation, one of the proper law of the contract, and one of its own law, each of which provides that no action shall be brought on any debt which has not been enforced for twenty years. If the proper law classifies its prescription as relating to procedure, and the law of the forum classifies its prescription as relating to substance, then classification of a rule of law according to the system to which it belongs would give the curious result that both prescriptions were inapplicable. The prescription of the proper law would be inapplicable because procedural, and the *lex fori* governs procedure, while the prescription of the *lex fori* would be inapplicable because substantive, and the proper law governs substance. The author quotes a German case in 1882 in which this situation arose [p. 161]. His way out of the difficulty is tantamount to an abandonment of his principle of classification. Again, suppose a Court seised of an action on a delict, classified its rule as to onus of proof as procedural, and suppose the *lex loci delicti* classified its rule as procedural, then the Court would have no rule for onus of proof, or if matters were the other way round it would have two rules for onus of proof.

The author's answers simply do not answer these criticisms.

Throughout his chapter on Classification, moreover, he occasionally refers to his process as classification according to the *lex causæ*. But classification of a legal rule according to the system to which it belongs is entirely different from classification according to the *lex causæ*, which means the system of law which ultimately governs the question—the proper law of the contract in a case of contract, *lex loci delicti* in a case of delict, etc. Classification according to the *lex causæ* is also impossible, but for the different and much simpler reason that it is impossible to discover what the *lex causæ* is until one classifies.

There has been an immense amount of logomachy among writers about classification, but few cases, which shows that the judges, approaching the matter from a practical angle, have not found great difficulty. Classification of a rule according to the system to which it belongs, and classification according to the *lex causæ* are both unacceptable because unworkable. This leaves two theories, classification according to the *lex fori*, and according to the general principles of analytical jurisprudence. Many of the differences between these views are purely verbal. The law of the forum cannot mean the internal law of the forum. If an English judge is confronted with an undertaking given without consideration in Scotland, where consideration is not essential for a binding contract, and is deciding whether to classify this as a case of contract or not, he cannot say that it should not be classified as contract because it is not a contract according to English internal law since there had been no consideration, for that would be deciding the merits of the case (whether or not there was a binding contract) according to the law of the forum, under the guise of classifying according to the law of the forum. That method would result in the stultification of all rules of Private International Law. There must be some generality about the principles which are applied as the law of the forum. Further, the laws of the forum have also to be classified for the purposes of International Law, and laws cannot be classified according to themselves; they must be classified according to some extraneous principles of general jurisprudence.

Classification is done according to the notions of general jurisprudence of the forum. The process might be described as the allocation of the issue to a category of the rules for choice of law of the forum. [Cp. the language of Robertson in describing primary characterization "Characterization in the Conflict of Laws", p. 86; Beckett, 1934 XV B.Y.I.L. 46 § 1; Unger, 1937 Bell Yard 8; Lorenzen, 50 Yale L.J., at p. 749.] The process might also be described as classification according to the International Law of the forum. This was the principle of classification adopted by the Privy Council in *Huntingdon* v. *Attril*, [1893] A.C. 150.

Constitutional Law. By E. C. S. Wade and G. Godfrey Phillips. Fourth Edition by E. C. S. Wade. 1950. London : Longmans, Green & Co., Ltd. Price £1 15s.

Professor Wade, who accepts sole responsibility for the fourth and latest edition of this admirable work, has maintained the realistic and critical approach to constitutional structure and development which was one of the characteristic features of the earlier editions. The result is a book which deals accurately and in adequate detail with the main principles and organs of the Constitution, but which yet remains fully alive to current developments, and makes stimulating reading.

The fourth edition in its arrangement has closely followed the previous edition. A new chapter has been added on Cabinet Organisation, and in this the author has drawn upon a variety of fresh sources for information about recent changes in organization of the Cabinet and about their importance. These sources include published lectures by such well qualified observers as Lord Ismay and Sir John Anderson, Mr. Churchill's War Memoirs and several recent Stationery Office publications. In this new chapter the author gives consideration to the system of co-ordinating committees of the Cabinet, a system which, as he truly observes, "has proved itself in the field of economic and social policy and indeed wherever a problem which overlaps the bounds of responsibility of a single department is in issue ". But he points out that the Minister who presides over a Cabinet Committee ought in constitutional theory to be on a parity with the other Ministers forming the committee; otherwise the responsibility of such other Ministers to Parliament for the conduct of their departments might be weakened. Moreover it is not possible in practice for a Minister to supervise departments without a duplication of staffs, which is expensive and tends to slow down the machinery of government. Professor Wade is not alone in his opinion that the increasing complexity of modern government has resulted in too much centralization, but he is more realistic than some other critics of modern tendencies in recognizing that decentralization would necessarily require less emphasis to be placed upon ministerial responsibility as applied to departmental Ministers. For the redress of individual grievances resulting from administrative intransigeance he would rely less on the letter or question to the Minister responsible, and more on the Courts, including independent administrative tribunals. He concludes the discussion of this matter with the statement that there are as yet few signs of any such solution. But that is perhaps too pessimistic a view, for the beginnings of such a solution are now on trial in the cases of the boards of nationalized industries and public corporations which have been deliberately withdrawn from ministerial responsibility on matters of detail in the hope of avoiding rigid central control. It may be that these boards and corporations have not yet perfected a satisfactory system and technique of control, but at least they represent an intelligent and constructive experiment with a new system of control.

The other chapters of the book, while not extensively re-written, have been brought up to date in the light of recent developments. The effects of Acts such as the Crown Proceedings Act, 1947, and the British Nationality Act, 1948, receive due attention, and some less sharply defined changes in the law are also noticed. For example, in the chapter on delegated legislation there are two additions to the " black list " of types of delegation which are particularly liable to objection. One of the additions is sub-delegated legislation, or what the Select Committee on S.R. & O. called " the great-grandchildren and the great-great-grandchildren " of the original empowering statute. The author points out that not only are there doubts as to the validity of orders and regulations which purport to have been made by virtue of such sub-delegated power, but also the practice of sub-delegation makes control by ordinary constitutional methods exceedingly difficult. The other newcomer to the " black list " is delegated legislation with retrospective effect; no doubt it would be generally agreed that delegated legislation with retrospective effect is objectionable, but it is a pity that the author does not give any examples of such legislation as they must surely be comparatively rare.

The chapter on Emergency Powers in Peace and War has been brought down to date by the addition of paragraphs dealing with the Supplies and Services (Transitional Powers) Act, 1945, and the Supplies and Services (Extended Purposes) Act, 1947. Of the latter Act the author observes that " the general character of the powers [entrusted to Ministers] is so wide . . . that the consequent relaxation of parliamentary control is significant ".

Two minor criticisms may be permitted. Firstly it would surely be more convenient if the chapters were numbered consecutively throughout the book instead of being numbered as at present, separately in each of the eleven Parts into which the book is divided. Secondly the statement (on page 227) to the effect that the Senators of the College of Justice number thirteen has evidently been made without reference to the provisions of the Administration of Justice (Scotland) Act, 1948, which restored the maximum number to fifteen.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

Woolley's A Handbook on the Death Duties. Seventh edition. By John H. Monkman, LL.B. 1950. London : The Solicitors' Law Stationery Society, Ltd. Price 27s. 6d. net.

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Saint Mary Magdaline in Mediæval Literature. By Helen Meredith Garth. The Johns Hopkins University Studies in Historical and Political Science, Volume 67, No. 3. 1950. Baltimore : The Johns Hopkins Press.

Buying and Selling a House. By M. Basil Evans, M.B.E., F.R.I.C.S., F.A.I., M.Inst.R.A. " This Is The Law " Series. 1950. London : Stevens & Sons, Ltd. Price 6s. 6d. net.

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Dymond's Death Duties. Eleventh edition. By Robert Dymond and Reginald K. Johns, LL.B.(Lond.). 1951. London: The Solicitors' Stationery Society, Ltd. Price £3 15s. net.

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JURIDICAL REVIEW

THE SCALES OF JUSTICE*

1

PORTIA awards Shylock the penalty he claims. But in doing so, she warns him: "If thou tak'st more or less than a just pound . . . nay, if the scale do turn but in the estimation of a hair, thou diest". The slightest deviation from the stipulated weight will spell his doom. It will make no difference whether he cuts too much by a stone or an ounce, or, indeed, whether he cuts too much or too little. He must be absolutely right to be safe—otherwise he loses all. Such are the scales of justice.

In any academic analysis of justice, be it by Aristotle over two thousand years ago[1] or by Professor Coing in 1950,[2] stress is laid on the importance of treating different situations differently, each in accordance with its individual character; and practical obstacles alone are recognized as limiting the principle. It would seem, however, that justice as a living phenomenon contains an element that is averse to finer differentiations, quite apart from practical difficulties. That symbolism of the scales expresses a deep-rooted tendency to see no shades between black and white, to admit no degrees of right and wrong, to allow no distribution of loss and gain among several litigants, to send a party away either victorious or defeated.

The criminal law of this country still imposes capital punishment on murder no matter whether (to adapt the words of Sir Walter Scott) "it arises out of the malevolence of the heart or the error of the understanding". As for private law, when we take the *bona fide* possessor—a person who, though not in fact proprietor, honestly believes himself proprietor—Roman law and its modern descendants, including Scots law, give him the fruits drawn by him while in possession; this is hard on the proprietor. English law gives the fruits to the proprietor, which is hard on the *bona fide* possessor. There is apparently no system which divides the fruits between them.[3] If an object sold is accidentally destroyed before delivery, Roman law and English law put the risk on the buyer: he must pay the price, receiving nothing. According to German law, he need not pay. There is no law which says that he should pay half the price. Paton writes that where two persons suffer by the fraud of a third, "ethics may suggest that the loss should be equally divided, but this is not a very practicable rule for the law".[4] This is perfectly true, only the law inclines to an attitude of "either—or" in a far higher degree than is necessitated by practical considerations.

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* An inaugural lecture delivered at the University of Aberdeen, on April 30, 1951.

[1] Nic. Ethics 5.3 ff.

[2] *Grundzüge der Rechtsphilosophie*, 181 ff.

It is not as if this element were present only in the strict, quiritary law of the Romans or the common law, and not in the *ius gentium* or equity. Equitable rules also favour the alternative of victory or defeat—complete victory or complete defeat—though they may differ from strict rules in deciding where victory and defeat should lie. *Condictio*, the recovery of payment made in advance if the service expected becomes impossible, is often rested on natural law. Yet it is a somewhat extreme remedy. Without it, to be sure, the party who has paid incurs an unfair loss. But the principle that he may recover the whole goes rather far in the opposite direction if, for example, the other person has already spent money on this transaction.[5] There was a period in Roman law when a seller was not automatically answerable to the buyer if the latter was deprived of the thing owing to a defect in title; the buyer might have to bear all the loss. It was largely by an elaboration of the equitable, *bonae fidei* nature of sale that warranty of title became an intrinsic part of it. The resulting rule might be preferable to the earlier one, but it was scarcely less rigorous. All the loss would now fall on the seller[6]—as it does in Scots and English law. A law which takes account of the error of a party entering into a contract usually does so in pursuance of equitable notions. But many systems, in declaring such a contract void or voidable, fail to make provision for the other party who was not in error and relied on performance.

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[3] Certain relaxations of the Roman law rule may be regarded as steps in this direction.

[4] *Jurisprudence*, 58. He is hardly right, however, in asserting that ethics throws little light on cases like this. If ethics demands that the loss should be divided, that is no less of a solution—from the point of view of ethics—than a demand that it should fall on one of the parties.

[5] Cp. below on the way the Law Reform (Frustrated Contracts) Act, 1943, deals with such problems. Professor T. B. Smith very kindly points out to the writer that, in Scots law, the common law has proved more flexible: *Cantiere San Rocco* v. *Clyde Shipbuilding Co.*, 1923 S.C. (H.L.) 105.

It is significant that, in legal history, whereas the institution of double, triple or fourfold damages is frequent, that of half damages is extremely rare. There is something in a compromise of this kind repugnant to justice. Certainly, even so, there is much scope for adjusting damages to the individual case. We may or may not include losses suffered as a remoter consequence of the act in question; we may proceed from the interest a party has in performance of the contract (the *positives Vertragsinteresse* of German law) or from that he has in never having heard of it, *i.e.*, in being restored to the *status quo ante* (*negatives Vertragsinteresse*). Still, while a system will readily credit its judges with sufficient discernment to determine the exact degree of care a depositee must have shewn if he is to be relieved of liability for loss of the article, and the different degree of care a hirer must have shewn, and the different degree again required of a commodatary, it may never give up the simple alternative between full liability and no liability; the loss must fall either on one party or the other. The power exercised by Scottish and English courts of mitigating the damages where special circumstances warrant it is by no means a feature of all modern systems. If my dog tears your trousers, without any negligence on my part, some systems make me responsible, others do not; and most waver between the two solutions, preferring now one and now the other. There are very few indeed which demand a sharing of the loss.[7] In the Scots law of reparation, if I inflict injury in self-defence, then, provided I did not go further than the occasion warranted, I shall be free from liability; if I exceeded the reasonable limits, I shall be liable, though even then there may be mitigation of damages at least. This is a flexible regulation, which will enable a court to deal with each case as it deserves. The English rule is similar. But when we come to German law, we find, on the one hand, that exemption from liability is not confined to a reasonable exercise of self-defence. So long as I had no other means of warding off an illegal attack, I am guilty of no wrong. Thus if a boy is about to pick one of my apples and I can save it only by shooting, I may do so.[8] On the other hand, once I overstep the boundaries of the permissible, I can no longer hope for mitigation of damages. Any action necessary to prevent an illegal aggression is justified; any other will involve me in full liability.

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[6] In Roman law, sometimes he might have to return double the price.

A large proportion of the law of evidence is designed to bring about a simple, one-sided verdict even where the facts actually known would seem to call for a middle course, if not a final *non liquet*. If A and B are agreed that A has undertaken to paint some of B's vases for a remuneration of £10, but neither of them remembers whether ten or twenty vases were to be painted, the rules of evidence of most systems will enable a court to decide whether it is to be the one or the other; and which it is to be may depend on the timing of the suit and the distribution of the roles of plaintiff and defendant. But few systems only will permit the court to say that it should be fifteen,[9] or that no decision is possible.[10] In Scottish criminal procedure, the verdict of

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[7] An early example, manifestly going back to an era when restitution was in kind, not in money, is Exodus 21.35; cp. Mishnah Baba Kamma 1.4.

[8] Some authorities, however, would invoke a general, unwritten prohibition of grossly immoral exercise of rights.

[9] See, however, a group of provisions in Mishnah Baba Metzia 8.2 ff.

[10] Classical Roman law did allow *non liquet*; there were no definite rules of evidence.

" Not Proven " is recognized. In many countries it is not; and even in Scotland, private law is not correspondingly liberal.

Gmelin, a leader of Continental sociological jurisprudence, *Interessenjurisprudenz*, which no one can suspect of undue leanings towards strictness of law, in exhorting the judges to put the real factors of life above logical construction, declares[11]: " In weighing conflicting interests, the interest that is better founded in reason and more worthy of protection should be helped to achieve victory ". The various interests, private and public, are to be carefully balanced against one another—no school makes more of this balancing—yet the verdict is to be acceptance of one and rejection of the rest. No doubt his language is a little unguarded, but it is interesting to note the kind of idea coming to the fore in an unguarded moment.

2

The association of the scales with this peculiar element of justice is extremely old. It derives from Egypt, where man, after death, in the nether world, is weighed against truth. Man, represented by his heart, is placed in one dish, truth, represented by a feather, in the other. The hieroglyph for truth is a feather: the slightest turning of the scales—" but in the estimation of a hair "—will decide the issue, and the choice is between salvation and annihilation. Osiris, King of the Blessed, waits to receive the acquitted, but the hellish monster with a crocodile's head, a lion's neck and the body of a hippopotamus, is eager to devour the condemned.

From Egypt the symbol spread in various directions: and it generally carried with it that extremist flavour. There is the episode from the Iliad,[12] where Zeus weighs the fates of Hector and Achilles, engaged in desperate single combat, to decide which is to live and which to die.[13] *Psychostasia,* the weighing of two souls one against the other, became a popular theme in Greek literature. Its foreign origin is betrayed by the fact that, at a stage of mythology prior to Homer,[14] the fates of warriors are weighed, not by Zeus, but by Hermes: he corresponds to Thot who records the judgment in the Egyptian nether world. Aeschylus wrote a tragedy entitled *Psychostasia.* Aristophanes in The Frogs parodies the weighing of souls. There is a throne in Pluto's palace reserved for the greatest poet. For some fifty years Aeschylus has held it, but now he is challenged by Euripides, newly arrived. So their verses are weighed in the balance. Essentially the scene is closer to the Egyptian prototype than is Homer: we are shewn a proper judgment of the dead in Hades. It may also be noted that, in the end, the question is not so much which of the two poets should occupy the throne as which is to live again and which to stay among the shades. For the winner of the contest may return to Athens, to avert by his advice and encouragement the doom threatening the city. If Dike and Themis, goddesses of justice, are represented with scales, so are Kairos, Nike and Nemesis, gods and goddesses of opportunity, victory and retribution. The scales symbolize things standing, or being weighed, on razor's edge[15]: the slightest deflection spells triumph or ruin.

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[11] *Science of Legal Method*, 131, quoted by Friedmann, *Legal Theory*, 219 f.

[12] 22.208 ff. Cp. 8.68 ff, a weaker imitation.

It is curious that Rome did not really adopt the symbol. The weighing by a god of the fates of warriors, as we find it in Homer, is indeed imitated by Roman writers, Virgil among them.[16] But there is no statue of Justitia holding the scales, neither do they figure among her attributes in any literary work. It is only on some coins that she is given them, like Aequitas and Moneta, but this is a relatively late development, and the scales have reference to the correct weight of the money rather than to the nature of justice in general. Hermes with the merchant's balance also is far from early and cannot be regarded as a continuation of the ancient idea. Possibly Venus, who occasionally appears with scales, has a stronger claim to consideration, if the meaning is that she weighs the hearts of rival lovers, to admit one to paradise and consign the other to despair. The interpretation, however, is uncertain.[17] Maybe the Romans found the radicalism of the symbol unattractive where the law was concerned. It may be recalled that of the austere description of the goddess of justice by the Stoic Chrysippus, Roman philosophers were inclined to say that it was the goddess of cruelty they would portray in this manner.[18] One third-century poem celebrating the syncretistic Virgo forms an exception. She is described as " weighing in the balance life and laws ".[19] This is plainly an allusion to the scales of justice ; and somehow the weighing of laws or rights is again conceived as a matter of life and death.

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[13] Homer, with dramatic effect, transfers the sinking scale from the winner to the loser; Aristophanes and others are nearer the Egyptian model in this respect. Moreover, Hector's scale sinks more than just a little: it departs to Hades.

[14] Though preserved in a later source, the Aethiopis; Gruppe, *Griech. Mythologie und Religionsgeschichte*, 681, n. 6.

[15] For the latter translation of Iliad 10.173, see A. B. Cook, *Zeus*, 2.1.860 ff. The Virgo with the scales of astronomy no doubt contributed to the bestowing of scales on Dike, Justitia and so on; see Jastrow, *Aspects of Religious Beliefs*, 363 f.

[16] Aen. 12.725 ff.

However, the Egyptian scales travelled not only to the west but also to the east. The Persian creed has it that a deceased person's good and bad actions are weighed at the Bridge of the Separator ; and according as the former or latter predominate, he may cross into paradise or must fall into the abyss below.

In the Old Testament, almost up to the end, allusions to a judgment in after-life are indeed suppressed. But the scales are there. Only it is the living that are weighed and whose hearts are probed. Man is light in the balance, mourns the Psalmist.[20] In Ezekiel's balance, the people is represented by the prophet's hair, of which God commands him to burn one part, strike with his sword another, and scatter the third.[21] Job desires to be weighed, in order to be found righteous.[22] God searches man's heart and spirit, says the author of Proverbs.[23] The most famous passage is no doubt from Daniel[24]: " Thou art weighed in the balances and art found wanting ". That means utter destruction: " In that night was Belshazzar the king of the Chaldeans slain. And Darius the Median took the kingdom ".

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[17] Though supported by a highly indecent weighing scene on a Roman tomb in the Rhineland ; see Hettner, *Römische Steindenkmäler*, 186 f.

[18] Gellius, 14.4.5.

[19] C.I.L. 7 No. 759, quoted by Cook, 2.1.734, n. 3. The Latin is " vitam iuraque pensitans ". Ought we to translate " weighing the laws, *i.e.*, span, of life "? Cp. a reference by Macedonius Consul to the scales of the Zeus of the Iliad, with which he weighs *πάντα νόμον βιότου*, " every law of life " (Greek Anthol, 11.380).

[20] 62.10.

Nevertheless, the belief in a judgment of the dead may well have persisted underground. At any rate, by the time of the New Testament, as a result of Persian influence, it had become part of orthodox Pharisaic doctrine: the Apocrypha and the Talmud are full of it. On death, or on the last day, a person's good and bad deeds are weighed against each other, and a single deed may prove decisive. It is in these writings that we first meet with the notion, dear to the Middle Ages, of God—or Mary or St. Michael—freely removing some of the bad deeds or throwing an additional weight into the dish with the good ones. Even the motif that Satan himself is cheated, that for example the bad deeds are taken off while he, in search for more, is not looking, already occurs here. All this time, the scales of justice are also applied, as in Daniel, to whole nations. In an apocalypse of the reign of Nerva, God is asked to weigh the sins of the unhappy Israel against those of the happy Gentile races, when he will surely resolve to overthrow the latter and reinstate the former.[25]

It is worthy of notice that the symbol was taken up by Islam as well as the Christian Middle Ages. On the last day, the Koran says, " whosoever shall have wrought an atom's weight of good shall behold it, and whosoever shall have wrought an atom's weight of evil shall behold it "[26]; and again, " as to him whose balances are heavy, his shall be a life that shall please him well, and as to him whose balances are light, his mother shall be the pit—and who shall teach thee what the pit is? a raging fire ".[27]

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[21] 5.1 ff.

[22] 31.6.

[23] 16.2, 21.2, 24.12.

[24] 5.27 ff. Whether *tekel* originally had a different sense is here irrelevant.

[25] 4 Ezra 3.33 f. Of course, judgment here is in favour of the party whose scale is the lighter.

[26] 99.7 f.

In Christian legend, the weighing of the good and bad deeds plays a great part. A usurer, whose life was one of wickedness and cruelty, is saved because of the Aves he prayed every day: Mary throws a rosary into the otherwise empty dish for the good deeds, and it outweighs the crimes. In artistic representation, however, we come across something much nearer *psychostasia* proper: the person awaiting judgment kneels in prayer in one dish of the scales, while his evil actions lie in the other. How long the ancient setting of the scales survived in Christian art may be gathered from a tapestry after a cartoon by Angelo Bronzino, of the sixteenth century, where Innocence is rescued by Justice. The latter is holding sword and scales. Her gesture purposely imitates the traditional gesture of Christ rescuing souls from hell; and her action is accompanied by that of Time who can be seen unveiling a young girl, the figure of Truth.[28] We are almost back in the hall of Osiris.

3

When we ask how justice comes to comprise this element of radicalism, the first point to mention is that there are many goods—among them perhaps the most important, such as good repute or a wife—the very nature of which precludes any compromise; or at least any compromise will appear unsatisfactory, if not artificial.

The original use of the scales of justice, we saw, is for settling a deceased person's fate. Of salvation, man feels that it must be complete—anything less is misery. Either he enters the kingdom of Osiris, or he is devoured by the crocodile-headed beast. Certainly most higher religions know degrees of salvation. But they are a product of reflection. In Plato's Gorgias,[29] Socrates recounts a legend about the judgment of the dead. In this legend, there are two roads, one to the Isles of the Blest, for the holy, and one to Tartarus, for the impious. There are two roads and no more. It is only in drawing out the moral of the story that Socrates introduces a place of custody where fitting sufferings are inflicted; and the incurably wicked alone are sent to the infernal dungeon for everlasting punishment. Zoroaster spoke of the House of Song, with eternal sunshine and happy companionship, and the House of the Lie, forever dark and lonely. In the later Avesta there are levels of heaven and levels of hell. A similar evolution, or tension, may be observed in Judaism and early Christianity. That "I have set before thee this day life and good, and death and evil" is a motif which, from Deuteronomy[30] through Jeremiah[31] to the Teaching of the Twelve Apostles,[32] again and again drowns any subtler distinctions. Between Lazarus in Abraham's bosom and the rich man tormented in the flame "there is a great gulf fixed".[33]

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[27] 101.5 ff.

[28] See Panofsky, *Studies in Iconology*, 84.

[29] 523 ff.

A man is alive or dead. You enjoy good repute or you do not; and not so long ago it was widely held that if an enemy besmeared your good name, the law could not right such wrong but you had to kill, or be killed by, the offender. You cannot have a share in a wife. Solomon's judgment illustrates well the situation created by a dispute about property which you can only possess fully or not at all. He simply must discover the true mother, since a verdict to halve the child would establish only a sham balance. Such a course might be possible if it were a question of a piece of land or a sack of corn. It is a subtle feature of the story that he should discover the mother precisely by urging the impossible compromise. The practice, nowadays common in a case of divorce, of dividing several children, or even one child, between the two parents is of modern origin. There are other examples of goods placed in the sphere of the absolute in one age and that of the relative in another. The

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[30] 11.26, 30.15.

[31] 21.8.

[32] 1.1.

[33] Luke 16.26.

Roman law of succession had two strange rules: one that a will must cover the entire property, *i.e.*, you could not restrict your testament to part of your belongings, leaving the rest to pass on intestacy; and another, "once an heir always an heir",[34] *i.e.*, once a man holds the position of heir, he cannot be divested of it. This meant, for instance, that you could not appoint an heir conditionally on his never touching whisky. Both rules go back to a time when to be heir was tantamount to being successor in the chieftaincy, the new sovereign—a dignity necessarily conferring powers over the whole estate and attaching to a person for good. When at a later date inheritance became a monetary affair, the jurists had no little difficulty in changing the law and giving effect to a partial disposal by will and to conditions like that mentioned.

It is safe to assume that cases involving those goods, which are susceptible neither of division nor, indeed, of compensation, exercised and still exercise a considerable influence on the concept of justice. In this connection, we may advert to Stoic ethics. According to the Stoics, in strictness, a man is either perfect or lost; either absolutely wise and just or absolutely foolish and wicked. If he is a hair's breadth below the highest standard, it is as if he were among the basest of the base. Here what is in general a minor, if significant, element of justice has become its dominant feature. And the explanation may well be that, fundamentally, this is a religious system, concerned with salvation—that good which you must have fully to have it at all. It is often asked which portions of Zeno's teaching, if any, reflect his native background. Presumably this extremist attitude owes something to Eastern ideas of initiation, and a severe division between those within, the few redeemed, and those without, the mass of perdition. The terminology employed in Stoic works supports this view. Seneca says[35] that "even that which is near is still outside", and Plutarch reports that, in the opinion of the

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[34] This apodictic form *semel heres semper heres*, however, occurs in no ancient text.

[35] Ep. 75.9.

Stoics, a man " may fall asleep mad and awake wise ".[36] While Plato had encouraged conversation, Zeno demanded conversion.

The Romans, we remarked, did not count the scales of justice among the essential attributes of Justitia. Nor did they greatly favour this Stoic principle. For Horace, the view that all offences of whatever kind are equally damnable is " contrary to natural feeling, tradition and expedience itself, the source of justice and equity ".[37] Cicero had said much the same, not only in a philosophical treatise,[38] but also in his defence of a consul prosecuted for bribery in the election campaign.[39] No doubt the jury thought that Cato, Cicero's opponent, a great-grandson of the censor, must be a queer fellow to hold that it was the same whether you unnecessarily strangled a rooster or murdered your father. Of course, Cicero was a clever advocate as well as a thinker, and, as far as his client's conduct was concerned, he was really begging the question. For he took it for granted that bribery, in moderation, was comparable to killing a cock rather than to killing one's father. But that is a different matter. He got Murena acquitted. The influence of Stoic philosophy on Roman law would have been very much weaker than it was had the " either-or " ethics not been considerably modified, on lines first suggested by Zeno himself. It is interesting that those parts of Roman law where the unmitigated principle is applied belong to the post-classical period, when academic speculation sometimes prevailed over common sense. We do find texts containing the notion that you are answerable for the consequences if you have not acted as a *diligentissimus paterfamilias*, or with *exactissima diligentia*, *i.e.*, if you have not shewn the highest conceivable degree of care, if your conduct has not been absolutely ideal. But as far as they are attributed to classical jurists, they must be looked upon as spurious.

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[36] That the Stoics make More Paradoxical Assertions than the Poets 4.

[37] Sat. 1.3.96 ff.

[38] De Fin. 4.19.55.

[39] Pro Murena 29.61 ff.

However, even where the law deals with goods in themselves perfectly capable of being shared or made up for by other goods of a similar nature, there are narrow limits to the degree of differentiation actually feasible. This practical necessity of drawing a line must have affected speculation about justice from the earliest times. It is no doubt among the factors responsible for the drawing of the line acquiring a status in its own right, irrespective of the needs of life.

This aspect is so well known that it suffices to select a few of the more relevant considerations. A thorough adaptation of each decision to the individual case would mean giving the judge a free hand. That would be too high a price to pay : it would be the end of any law. It is easy to go too far in this direction. In Rome, under the late Republican régime of fixed, statutory punishments for the various crimes, little allowance could be made for any special circumstances of a case. In the second century A.D. greater flexibility was demanded, and the judges acquired the power of choosing a suitable penalty. But it was not long before the disadvantages of cadi justice made themselves felt, and from Constantine, the previous system of fixed punishments operated again, though on a different constitutional basis.[40] Again, in contradistinction to the XII Tables, which had subjected certain forms of insult to fixed money penalties, the *actio iniuriarum aestimatoria* made it possible to adjust the fine to the individual facts. But, significantly, a number of precautionary measures became usual, designed to prevent any excessive arbitrariness. The results were probably more satisfactory than under many a modern regulation, where the judge's discretion to assess the damages for insult is practically absolute. The dangers of the programme of the Free Law School have often been emphasized.[41] It would not do to allow the judges freely to vary the punishment of murder in accordance with the impression produced on them by the particular situation.

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[40] Levy, *Gesetz und Richter, pt. 1, Strafzumessung.*

[41] But it is hardly fair to say, as Friedmann does (*Legal Theory*, 224), that National Socialist administration of justice was an application of it. Rather was it a travesty, and there is no set of principles which is not open to abuse.

Again, though flexibility of the law could sometimes be achieved without conceding undue freedom to the judge, there are other obstacles. Theoretically, there is no reason why many different types of murder should not be established by statute—most systems known went through a stage where murder and culpable homicide or manslaughter were not carefully distinguished; no reason why there should not be a rule dividing the fruits of a thing between owner and *bona fide* possessor, or the risk of accidental destruction of an object sold but not yet delivered between vendor and buyer, or the loss resulting from harm inflicted without intent or negligence between the agent and his victim; no reason against the unrestricted admissibility of *non liquet*. But a lawgiver moving too rashly this way might find his losses greater than his gains.

In criminal law, in particular, simplicity and general intelligibility are of the highest importance, and not bought too dearly at the cost of some rigidity. The recognition by some American States of various degrees of murder does not seem to have produced satisfactory results. It is a sound instinct which prevented the Romans, as it prevents the lawyers of this country, from elaborating criminal law in the same degree as private law.[42] As for the latter, over-subtle solutions are apt to upset the smooth running and security of commerce. A provision that an honest vendor who did not procure title should be liable only for half the loss would hamper trade. A buyer must be able to rely on title and safely dispose of the object. If you in good faith obtain a stolen thing, the law may specify conditions under which you acquire it for good, and others under which the original proprietor retains his position. In several Oriental and medieval systems, but also in modern French law, a compromise is struck: you may keep the object which you bought in good faith unless and until the original proprietor offers you the price you gave for it. There are advantages in this compromise: a buyer in good faith will never lose his money, while the original proprietor, for whom the object may have sentimental value, has a chance of redeeming it. The classical Roman jurists, however, consistently rejected this right of redemption, which was suggested to them by provincial authorities. It was not compatible with their clear, precise notion of ownership.[43] Similarly, the institution was eliminated from the final draft of the German Civil Code. In general, the attempt to distribute as widely as possible any loss innocently suffered would render legal relations quite unstable: every time there would be set in motion a wave going the length and breadth of the community.[44] With regard to the law of evidence, obviously, the exclusion of a verdict of *non liquet* by appropriate presumptions—except perhaps in a few closely defined, exceptional cases—prevents uncertainties intolerable in modern commerce. A wrong solution of a dispute brought about by the rules of evidence is preferable to no solution.

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[42] Mommsen, in his chapter on punishments in the criminal law of the Roman Republic (*Strafrecht*, 906), speaks of the " wonderful simplicity " of the system.

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There is little doubt, however, that, in addition to these practical factors operative at all times, certain historical developments have contributed to the infusion into justice of an element of extremism. The prevalence at some stage of civilization of trial by battle or by ordeal must have been favourable to the idea that litigation can end only in complete triumph for one party and complete defeat for the other. In the judgment scene of the ancient Egyptian Book of the Dead, man is weighed against truth: it is not a balancing of actions and arguments, but a contest between two beings—man and truth. The picture of man's good deeds being weighed against his bad ones is much later. We find it only in Hellenistic Egypt,[45] in Persia and in regions influenced by the two. In the Greek epic, the God weighs the fates of heroes actually fighting : Achilles and Hector, Achilles and Memnon. Aristophanes, it is true, introduces the scales to settle the claims of Aeschylus and Euripides. But as the two are allowed to choose the verses they want considered, and as each time Euripides places a verse in his dish Aeschylus tries to think of a weightier one for his, and also as they keep insulting each other, the atmosphere is that of a duel, and the chorus is justified in likening the poets to warriors.

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[43] Felgentraeger, *Antikes Lösungsrecht*.

[44] See Paton, quoted above.

[45] The significance of the change between the Book of the Dead and the Hellenistic conception is not noted by Erman, *Handbook*, transl. by Griffith, 102, 230.

Up to this day, terms of combat are far commoner in descriptions of legal disputes than, say, in those of controversies between scholars. The latter may be just as heated, but the historical background is different. "In weighing conflicting interests, the better founded should be helped to achieve victory", says a spokesman of *Interessenjurisprudenz*.[46] Such a reference to victory is more than a mere manner of speaking. As is well known, where a dispute is settled outside the courts, by private arbitration or an understanding between the parties, one-sided solutions are less frequent and there is usually give and take. These ways of ending a dispute originated precisely as alternatives to the more violent method, feud or combat. The Latin term *pactum*, first used in this context, comes from *pax*.

Another historical phenomenon here to be mentioned is the tendency of early lawyers to conceive of any legal question as one of wrong-doing and its suppression. Crime and delict will always arouse greater interest than, say, contract in anyone not a specialist in the latter field, and will therefore always contribute rather more than they should to the popular concept of justice. But in early law, cases are brought under crime or delict which, in the modern view, have nothing to do with either. There is a feeling that the mere fact of your not obtaining what ought to belong to you constitutes aggression : if a person who has given you a promise does not fulfil it, the matter calls for vengeance rather than enforcement. As a corollary, it is thought that, fundamentally, the repulsion of aggression is the principal task of the law. Here is a further source of the radical leaning we are investigating.

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[46] Gmelin, quoted above.

There is a fair amount of evidence that the starting-point of legal philosophy was criminal law. This is, of course, less immediately clear from the work of a man like Plato, who is representative of mature analysis. But it is criminal law problems that are put in the Oresteia, where Aeschylus attempts to harmonize religion and law. The Old Testament prophets proceed in the same way. The earliest, or at least the most archaic, extant work on rhetoric, the Rhetorica ad Alexandrum, in its chapter on forensic pleading, distinguishes between charge and defence. And it says that the defence must do one of three things : either deny the deed, or admit it but shew that it was justified, or admit it but ascribe it to a mistake and represent the harm which resulted as negligible. Manifestly, the author has in mind criminal proceedings.[47] The oldest occurrence of the scales of justice is in the underworld, as a means of deciding a capital charge.

Yet a third cause of the aversion of jurists to overmuch differentiation and compromise should not be overlooked in a discussion of historical factors, namely, individualism—the idea that a man can look after himself, that he wants to be his own master and all he asks of others is not to interfere with him. It has often been pointed out that this approach is particularly pronounced in classical Roman and English common law. But it is noticeable, in some degree, where-ever private law reaches a certain level of evolution.

Take the example of damage caused without fault. It is quite consistent with an individualist régime to exact compensation, since there has been interference by one person with another. It is also consistent with it to refrain from exacting compensation, since a person must put up with accidental losses befalling him, and damage caused without fault might be classed as accident. But to make them share the loss—in itself a perfectly reasonable solution—would be establishing a community of interests in the place of two separate spheres. Similarly, the position of a *bona fide* possessor, in actual control of the property and honestly conducting his affairs as if it were his, may be deemed strong enough to entitle him to the fruits; or it may not be deemed strong enough. A rule that the fruits should be divided between him and the true proprietor, though it might produce the fairest result, would be infringing the independence of each. If an object is sold at an excessively low price, the law may let the sale stand, as in conformity with the declared will of the parties, or it may treat it as void or voidable, since it is contrary to the principle of fair exchange. It may also lay down that the sale should be upheld—or that the buyer should have power to uphold it—at a just price. But this solution amounts to the law making the contract for the parties. It did not enter Roman law till the post-classical epoch or even Justinian, and, while French law has adopted it, other Roman law systems like Scots law, German law and Swiss law have not.

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[47] Ch. 4; see Himmelschein, *Symbolae Frib. Lenel*, 377 f.

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The modern development is clearly hostile to the "either-or" attitude and, within the limits of the practicable, tends to do away with the vestiges of this element. An institution like the rent tribunals goes far beyond the provisions of the Corpus Juris regarding sale for too low a price in imposing external terms on a private agreement. Even the almost unfettered discretion of the tribunals does not seem to have been found an insuperable objection. This is only one of many instances of the encroachment of administration and administrative methods on the judicial domain—a characteristic trend of our age.

Administration does not use the scales of justice as conceived by the ancients. The ideas of combat and of the exclusiveness and self-sufficiency of the individual's province are alien to administration. They do not here interfere with the aims of a proportionate distribution of goods and risks, and of the subtlest possible adjustment of any decision to the particular situation. The wide discretionary powers of those in charge are indeed a danger, but less so than they would be in judicial questions. In a way they carry their own remedy with them : the same freedom which may lead to misjudgment usually makes possible its rectification.

It is superfluous to dwell on the expansion of the field of administration in the past hundred years or so. We may observe it in criminal no less than in private law. The prominence of the objects of education and rehabilitation in the former and measures of socialization in the latter are all part of the same development. If we were to apply the traditional Aristotelian categories, we might say that contemporary evolution is from *iustitia commutativa* to *iustitia distributiva*. The ideal of a universal community of interests, subdivided into smaller communities, in all of which each member at any moment should occupy the position best suited to his needs, faculties and deserts is constantly gaining ground at the expense of the ideal of justice between man and man. The hope for justice between man and man is replaced by that for justice among men.

The spirit of the age is at work even in branches of the law remote from administration. Two recent Law Reform Acts illustrate this. The Law Reform (Frustrated Contracts) Act, 1943, applicable to contracts governed by English law, provides that, if a contract is discharged because performance has become impossible, no payment can be asked for and any made in advance must be restored. If this were the whole regulation, it would be typical of the "either-or" justice which avoids a compromise. In the Roman law of hire, for example, if events occurring after the conclusion of the contract made it impossible for the lessor to supply the object, the lessee was released from the obligation to pay rent and could recover anything paid in advance. Scots law agrees, and so, since the judgment of the House of Lords in the *Fibrosa Case*, [1942] 2 All E.R. 122, does

English law, though in neither case on classical Roman grounds.[48] However, the Act in question adds that, if the party who cannot perform has already incurred expense, the court may allow him to claim or retain a fair sum; and similarly if the other party has already derived some benefit. Here, even at the price of allowing the courts a good deal of discretion, a middle course has been adopted between various older solutions. One wonders whether any claim could have been preferred by the ticketholders for a recent boat race ended by one team sinking into the depths like a stone.

The Law Reform (Contributory Negligence) Act, 1945, is no less remarkable. Roman law and common law, from different starting-points, had come to the conclusion—roughly—that a pursuer's failure to take reasonable care for his safety was a complete defence to the action. Thus a person invited into unsafe premises and suffering injury could not recover anything if by the exercise of care he might have escaped. Under the new Act—anticipated by Continental codes—the court awards damages reduced by as much as appears fair having regard to the claimant's share of responsibility. It is not accidental that similar regulations have long existed in maritime law—the rules concerning collision at sea of the Maritime Conventions Act, 1911, may be recalled. In maritime law, the idea of a community of interests plays a dominant part from very early times. By the *lex Rhodia de iactu*, a Roman statute modelled on Rhodian sea law, it was provided that, if one freighter's cargo was thrown overboard to save the ship from peril, the loss must be shared between all.

It is not unlikely that, at some future date, principles like this will be extended to many more or less analogous situations. The law relating to damage inflicted on another's property in order to avert danger to one's own or a third party's may well undergo fundamental changes as a result of the general relaxation of rigid rules and under the influence of a fresh orientation. The doctrine of a community of interests and proportionate shares may be stressed over against that whereby there is non-interference and the loss lies where it falls. Decisions may be adjusted to the particular circumstances of the case instead of being wholly in favour of one party or the other.

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[48] See Buckland, *Harvard Law Review* 46, 1284, but, as for Scots law, cp. also above, note 5.

Recently, at Cambridge, a statistical laboratory has for the first time been established. Something of this kind is perhaps destined to become the symbol of modern justice in the place of a simple pair of scales.

DAVID DAUBE.

PECCAVIS IN DIVORCE LAW AND PRACTICE

Ego amplius deliberandum censeo: res magnast.
Phormio. ii.453. Terentius.

THE application of the law as presented in 1878 by Lord Fraser in his standard Treatise on *Husband and Wife* with regard to the significance and value of confessional evidence, whether dated before or after the commencement of legal proceedings, seems by decisions of the Second Division between 1927 and 1945 to have been completely overlooked. This is undoubtedly due to a lack of discrimination in dealing with two distinct forms of confession or admission as grounds for divorce. In common parlance these terms are interchangeable: in legal usage they are absolutely distinct. Confessions, generally made voluntarily, are of great value: admissions, usually by way of answer to some allegation, are (or at least until 1927 were) "of little or no value". Incidentally, Fraser at p. 1669 of Vol. I of his *Husband and Wife* states:—

> "The confession of guilt, by way of judicial admission, is not by the law of Scotland held to be sufficient."

Confessions need no corroboration. Admissions have been recently held as of use in surmounting *insufficient* proof of adultery.

Broadly speaking, there are two classes of confessional evidence:—*Class I. Confessions: Ante Litem Motam.* These are properly described as *Extrajudicial:* made prior to all suggestion of litigation and absolutely distinguishable in nature and value from *Class II. Admissions: Post Litem Motam*: sub-dividing into:—

(A) *Judicial*: contained in:—

(1) defences: (2) minutes: and (3) depositions of defender and/or co-defender, as the case may be, cited respectively as such or in the case of

the paramour as a party for his or her interest: all *in foro*: and

(B) *Extrajudicial*:—

(1) Explicitly, *e.g.*, in letters passing between parties: or (2) by implication, from conduct, such as non-opposition to summonses and intimations formally served on or made to parties interested.

Class II (B) *Admissions* cannot be properly described as judicial. They are, of course, extrajudicially made, but ought to be treated, as in the past, in a wholly different manner from *Class I Confessions*. Lord Anderson was obviously mistaken in describing, in *Smith*, 1928,[1] as judicial, admissions made *ex foro* in letters produced in process.

Averments in any summons of infidelity, where no confession is founded upon, must be substantiated by proof, as if no such *Class II* (B) Admissions had been made or were to be made. Their aid can only be prayed (if at all and that is doubtful) after such proof has been taken for their more or less suggested conclusive import and effect, if necessary, upon an assumed *insufficient* proof. Dickson in the first edition of his *Evidence*, not dealing with admissions under *Class II* (B) Admissions, was plainly right in suggesting that in cases resting on *Class I* Confessions, it should not be necessary to "load" the proof. Indeed, however, he overlooked the fact that a *peccavi* of *Class I* might form the *sole* ground for decree. Such was frequently the case long before Fraser came to the Bar in 1843.

A *peccavi* of *Class I* needs no proof of other facts bearing on the question of guilt, provided it is held as the result of the proof to be:—

(1) genuine; made in good faith; unambiguous; voluntarily and deliberately made; or, as one Judge puts

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[1] 1929 S.C. 75.

it, so far, aptly and tersely, "full and frank", slipping the further essential, "and free"; and

(2) subject to no reasonable suggestion of collusion.

In the proof of confessional evidence, it need hardly be observed, evidence must be also led of all supervening facts, *e.g.*, separation of the spouses after knowledge of confession; unsuccessful efforts, if any, at reconciliation, where the innocent spouse is prepared to condone. This article, therefore, proceeds upon the assumption that *in all cases cited* in support of its main contention, confessional evidence, where not specially expressed, has *only* been accepted judicially *if* meeting the two *provisos*.

Further, it is necessary to consider that the guilt of adultery, whether regarded both in Scotland and England in times[2] gone by as a capital crime or now only as a civil misdemeanour, suffers no gradation in its judicial estimation. Confessions in some cases may disclose gross misconduct; in others, draw silent sympathy: that nothing happened from a single slip may be a blessing, but is no palliation. All such circumstances are equally indifferent to the one inevitable result—in the option of the injured spouse—breach of the marriage bond, vow or relation with its dissolution.

There is also another consideration that should never be lost sight of. But for such confessions, some misdemeanours might never be known to an injured spouse. Secret assignations, even when confessed, could never in some cases be followed up and judicially "substantiated", which the novel view, as stated later, seems to require. No confessing spouse is bound to tell of anything beyond what the *peccavi* contains. It is the same with the paramour. Even the name of the guilty accomplice cannot be extorted. Where disclosed, the accomplice may have disappeared without means of being traced. In such a case should the injured spouse be denied "remeid" because of inability to furnish either positive or inferential facts in support of the confession made? It is submitted, as Fraser did, that Scots law requires no such sufferance.

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[2] See Stair, 1681; Bankton, 1751; Erskine, 1773; and Hume, 1797. These institutional writers, it is believed only deal with the criminal consequences of *peccavis*. Pothier, so far as can be found, has nothing on the subject.

In *Wheeler* (1881), 17 Ch. D. 675, at p. 681, Jessel, M. R., observed :—

> "Communications made to a priest in the confessional on matters, perhaps considered by the penitent to be more important even than his life or his fortune, are not protected".

Doubtless, behind this pronouncement lay the feeling that it is inconceivable how ministers of any creed can profess to give sanction to a course of action that may result in an absolved sinner acting a lie for the rest of his or her life towards the innocent partner.

There is this other phase upon which, it seems, clergy of no denomination exercise any beneficent influence. One spouse may confess voluntarily to falling. It does not necessarily follow that the consort, who may have fallen ever so often, will mercifully forgive, even without unbosoming secret and blacker sins of his or her own. People are denied admittance to Courts of Law unless their hands are clean. English Judges do enforce this sanction to this extent at least in divorce suits: any petitioning spouse seeking dissolution of the marriage tie, because of the fault of the other, must disclose the ways in which he or she has stumbled as the *only* condition in which *discretion* may be exercised *in his or her favour.* Cross actions for divorce are not allowed in England. Contrariwise in Scotland, a pursuer may enter the Court of Session with absolutely "filthie" hands and demand and obtain decree of divorce for the sins of a partner, without any obligation to show mercy or even to disclose the very blackest of records. Nay, that pursuer may have been one who has received unconditional absolution from his or her Church. Indeed, no one can tell how many spouses have been unfaithfully treated, without the opportunity of righting their wrongs, through secret sins only confessed to priests. Whether Judges of both countries may wisely refrain, as seemingly they have the power, from ordering disclosure, is another matter.

The whole question, too, may be relieved from all embarrassment created by the case of *Muirhead*, 1846.[3] It has perplexed some of our Judges. Apparently the pursuer's counsel, seeking for judicial separation in respect of infidelity, desired decree *de plano* from Lord Ivory. The defending husband stated in a minute that, while he denied some of the pursuer's averments, he admitted that the others were true, and therefore he consented to decree. Lord Ivory thought, despite the *peremptory* words about proof of the relevant statute, that the motion deserved the consideration of the Inner House. The case went there and was sent back to him to take proof of the pursuer's averments *independently* of the defender's admission. The case has no bearing upon any summons based on confessional averments *ante litem motam*. No one ever disputed that these averments must be proved. Besides, all proofs in divorce cases, defended or not, seem now to be regulated by Rules of Court, No. 170 *et seq.*, which require as formerly that the libel or condescendence annexed to the summons should first be held relevant.

Why should proof be necessary in the presence of consent to decree or in the absence of defence? Because, as Fraser stated in 1846 at p. 697 of Volume I of his First Edition, the Legislature in 1830 enacted that:—

> "no Decree or Judgment in favour of the Pursuer shall be pronounced in any of the Consistorial Actions hereinbefore enumerated, whether Appearance shall or shall not be made for the Defendant (*sic*) until the Grounds of Action shall be substantiated by sufficient Evidence".

Lord MacDermott put the English view in *Preston-Jones*, 1950[4] (a case fully dealt with later), at p. 138 and practically to the same effect as in Fraser.

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[3] (1846), 8 D. 786.

[4] [1951] 1 All E.R. 124.

Before stating, however, the law as represented by Fraser, the extent of the present confusion in judicial opinion may be seen by quoting the following passage from the pronouncement of an Outer House Judge in 1945 :—

> "It is *trite* law that a confession of adultery by the defender, however full and frank it may be, is not in *itself* sufficient to entitle a pursuer to decree of divorce. Some further evidence *tending*[5] to establish the alleged adultery is required, and the question in the present case, as I see it, is whether the mere production of the extract birth certificate supplies what is necessary in the way of further evidence. In my opinion it does not." (Writer's italics.)

Fraser was first published in 1846. It is more than interesting to set forth the then state of Scots law as regards confessions in so far as it can be gleaned from old records.

(1) *Cruickshank*, 1681.

> "Adultery was and is instructed by the acknowledgment of the husband and his whore in the Kirk-session of St. Cuthbert's (presumed of Edinburgh) making public acknowledgment therfore (*sic*); and if any acts were posterior they were after the libel, yet the Commissaries repelled this allegiance (*sic*) unless the adultery were known to the wife by judicial acts which no law required; but only that the wife, after knowing the acts cohabited."

(2) *Ker*, 1691.

On p. 52 of Lord Hermand's *Collection*, this pleader's note in reference to this case, in which an acknowledgment had been made before one Baillie of Edinburgh, two ministers and two elders and by which the defender, John Lesly, writer in Edinburgh, was implicated, is found :—

> "*Answered* to the 1st (*Argued* for the defender, the confession being extrajudicial cannot be held for

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[5] "Tending" is meaningless: sometimes used by mistake for "instructing" or "showing" in drafting specifications for recovery of documents.

> evidence): The confession was judicial, as made before a Baillie, ministers and elders; and confessions before kirk-sessions and presbyteries have always been deemed relevant in processes of this kind."

(3) *Montgomery*, 1693.

(4) *Preston*, 1696.

It is unnecessary to set out the facts of cases (3) and (4).

(5) *Trail*, 1720.

> "Decree of divorce upon a libel, not mentioning the name of the adulterer, and quho (*sic*) was not condescended upon in the course of the process, but setting forth that the pursuer had sailed for Norway in January, 1718, leaving his wife with child, and did not return from thence till July, 1719, notwithstanding which, the defender was again got with child, and was delivered thereof in June, 1719, before the pursuer's return, and had acknowledged herself to be guilty of adultery before the kirk session."

(6) *Hall*, 1730.

> "The like, upon a proof in absence, that the pursuer had sailed for America 14 Nov., 1727, where he had remained till the 16 of July, 1729, when he sailed for Glasgow, and arrived at Lochryon upon the 26th of September, upon which day the defender was brought to bed of a child, after her husband had been absent from her for 22 months."

(7) *Braid*, 1734.

> "Decree of divorce, upon a libel not mentioning the guilty person, but bearing that the pursuer lived at London from June 1731, to January, 1734, without being out of the county of Middlesex for two days together; that during that period the defender had resided at Edinburgh without being two days successively out of Scotland; that nevertheless she bore a child in September, 1733, and being called before the Session of

the College Kirk of Edinburgh acknowledged that it was begot in adultery, as indeed it was impossible that it could be begot by the pursuer."

These cases of *Trail*, *Hall* and *Braid* are quoted in full because of their bearing on *Preston-Jones*, already cited. In *Hall's case* there is no reference to any confession. The naked facts need no confession. In *Preston-Jones* there was a confession but of so dubious a character that the Lords disregarded it. How far back precedents in English law may go has not been investigated.

Lord Hermand records in his *Collection of Consistorial Cases* at p. 51 a case that is most pertinent *ad rem* under this heading :—

"*Confession of Adultery*

In several instances, I find *confession* before Magistrates or ministers mentioned among other grounds of divorce upon adultery. As" (3) and (4) already cited. "But in the following case it appears to have been the sole foundation of the judgment."

(8) *McInroy*, 1762.

"In an action of divorce for adultery, the pursuer produced extracts of the proceedings of the kirk-session and presbytery, by which the defender had been obliged to perform penance in sackcloth as guilty of adultery with Elspeth Macglashan, his servant maid. Among these was a petition from the defender himself acknowledging his guilt, but praying to be excused from the penance. The defences before the Commissaries also contained an admission that he had got the woman with child, which he excused by saying that the pursuer had left him on pretence of his being impotent and upon the whole threw himself upon the mercy of the court. The pursuer insisted that he should be appointed to confess or deny whether the petition to the kirk-session was subscribed by him, and he having been held as confessed for not appearing to make answer, the Commissaries

> found sufficient evidence of the adultery, and decerned in terms of the libel, . . . "

Lord Fraser did not found upon any of these old cases. The last reported case upon which judgment is based on confession before a kirk session is that of *Campbell*, 1860.[6] It is specially noted in his 1878 Edition. *Campbell* stands out as one of the most fantastic of all matrimonial causes recorded in Session Reports. Lord President McNeill, delivering the opinion of the Court, referred to the first and the only proved item of fact—a kirk session confession—in the case as opening the " drama ". No attempt was made to prove that adultery, as averred, was continuous. This, it is supposed, is one of Moncrieff's " elements ".[7] Alleged intimacy and familiarities were not proved: another " element " ! The only evidence upon which the Court rested its decision was that of the acknowledgment by the defender before the kirk session of his parish of the paternity of the first child his paramour had borne to him. The Court held in the words of Lord McNeill that his confession " pointed irresistibly to the conclusion of guilt on the part of the defender ". The Lord President said :—

> " I cannot figure any thing stronger in support of the statement that the party is the father of the child of the alleged connection at least having occurred between him and Ann Fletcher than his own confession, if it be a deliberate confession sufficiently vouched ".

The rubric of the case bears correctly that " the extra-judicial confession of an illegitimate child's paternity was held sufficient to infer adultery in the circumstances ".

Every case may be described as one " in the circumstances ". It is a misconception of the case, however, to suggest, as did Lord Moncrieff (see *Stewart*, *infra*) that the kirk session's certificate was " corroborated " by any other circumstance or needed any confirmation. It is submitted " the circumstances " or " other elements " of *Campbell*, 1860, to use his Lordship's words, were nothing more than unproved and unessential allegations of various matters. Fully and fairly considered, the judgment of the Court justifies, and up to the hilt, the statement of the law as presented by Fraser. After all, Lord Stowell, whom Fraser cites, was not original in placing faith in confessions. Such reliance rests, and far back, on old Scots cases, based in turn on common sense.

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[6] (1860), 23 D. 299.

[7] See opinion of Lord Moncrieff referred to on p. 147.

Indeed, Fraser well observes in his *Conflict of Laws*, p. 41 :—

> " The Consistorial Law of Scotland is the oldest portion of our jurisprudence. It was matured at a period when our history fades away into vague tradition. It was a code of laws, before the institution even, of the Court of Session . . . . The decisions of 600 years ago are precedents for the Consistorial Courts of Scotland at this day ". (1860.)

Before dealing with the Second Division case of *Fullerton*, 1873,[8] the other authority cited by Fraser and the first reported case based on an extract certificate of the birth entry of an illegitimate child, the procedure under the Registration of Births, Marriages and Deaths (Scotland) Act, 1854, and Amending Acts may be shortly described. According to Form B, where an entry is made " *at the joint request* " of the mother and of the person acknowledging himself to be the father, that person attends and signs *as informant* along with the mother and *is registered as the father*. As such, the questions put to both are answered in this Form B. It becomes the basis of the entry in each of the duplicate Register Books. The father and the mother then sign these registered entries. The Registrar completes the entries by filling in the date and adding his signature *before* the departure of the informant, in this instance the father. Thus it will be seen in such a case the wife and her paramour solemnly *twice* affirm their responsibility for the child. In days gone by, they certainly would thus have qualified for capital punishment.

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[8] (1873), 11 M. 720.

No judicial notice seems to have been taken that the father and the mother in such cases, according to the Act of 1854, were liable to transportation for seven years for any false statement they might make to the Registrar. Now under the False Oaths (Scotland) Act, 1933, covering all declarations or statements, signed or unsigned, parties can only be punished by money fine for any false statement made in connection with the registration of such births. Does not all that procedure give great significance to such confessions? Why should such publicly confessed adultery need to be further "established"?

The content of such extract certificates has been wholly overlooked by some Judges. Dickson on *Evidence*, too, it is submitted, falls into error when he states in section 284 that they are not *probatio probata*. *Prima facie*, they ought, as they have been, to be accepted as proof of the birth of the child as registered. It is true, as Dickson says, they can be impugned as false and fraudulent. But that seems no reason for not holding them as *probatio probata* in all other circumstances non-suggestive of criminality. It is not customary, where fraud, insanity or some other good cause is not alleged, for pleas of guilty to be rejected in Criminal Courts because they are *uncorroborated* or *not confirmed* by proof of some facts or fact "*tending*" to their "*substantiation*". It does seem erroneous to treat any kind of confession, falling under *Class I* and especially made *scripto*, as merely an "adminicle" of evidence. So far as proof of adultery is concerned, all "adminicles", *pace* Walton on *Husband and Wife* and despite its unaltered revision in the Second Edition, properly understood, are out of place in such circumstances.

The case of *Fullerton* is concise and short in its averred facts. Lord Shand refused decree, not accepting as conclusive *per se* the extract of a birth certificate signed by the wife as the mother of a child to "an unknown man". The pursuer reclaimed. His counsel, not citing *Campbell*, 1860, referred to two cases only, noted by Fraser as in 2 Hagg. C. C. 223. It is unnecessary to quote the opinions of Lord Stowell in each of these cases. *Robinson*, 1858, *infra*, which follows the law as stated by Lord Stowell, was not cited. The Second Division reversed Lord Shand. The Court consisted of Lord Justice-Clerk Moncreiff with Lords Benholme, Neaves and Cowan.

In giving the leading opinion in this case, Baron Moncreiff said :—

> "It is no doubt true that the main evidence here rests on the confession of the wife, and the real evidence of her own and deliberate and personal acts. *But the only ground on which the confession of the defender can be excluded* in such a case is *the danger or element of collusion.* But where there is no room for that element and in this case there can be none, no evidence can be stronger and in England has been repeatedly admitted in circumstances much less strong. All the circumstances, the separation of the parties, the wife's habits and mode of life all tend strongly to corroborate her conduct in deliberately registering her child as illegitimate . . . . As evidence of the wife's guilt, I think they are conclusive." (Writer's italics.)

The separation of the parties did not instruct the wife's infidelity; still less her mode of life. Such facts proved the wife's deliberation in the registration of her child as not that of her husband: they did not corroborate the infidelity. In short, there must always be a proof of the setting or *circumstances* in which a confession is made with a view to demonstrating its genuineness.

In cases immediately following *Fullerton*, very little evidence was required by Outer House Judges in regard to the surrounding facts in which guilt was confessed before proceedings had been raised. Before passing from *Fullerton*, it only remains, however, to be observed that it is the last case of the kind in which a pursuer was not competent by law to give evidence on his own behalf. Fraser, it is thought, missed this point in adding the note which he did to (b) on p. 1171 of Volume II.

Coming to 1878, when Fraser published his Second Edition, he quoted at length the opinion of Lord Chief Justice Cockburn, in *Robinson*,[9] as correctly setting forth the law of Scotland, in Vol. II, pp. 1170 *et seq.*, including this passage :—

> " And, therefore, if there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions; *although there might be a total absence of all other evidence to support them*". (Writer's italics.)

Fraser then states :—

> " *The judgment* thus delivered is in accordance with the *law of Scotland.* A deliberate acknowledgment of adultery made by the husband before a kirk session . . . was held to be admissible evidence in proof of adultery, there being no rational motive assigned for the confession of paternity of the bastard, except the desire to speak the truth. (b) (*Campbell*, 1860), p. 1170. *The law, therefore,* is *that extrajudicial confession*, if free from the taint of collusion, and without any corroborative circumstances whatever, is *sufficient* proof of adultery against the party making it : a doctrine subsequently recognised in another case. (a) (*Fullerton*, 1873)", p. 1171. (Writer's italics.)

In 1893,[10] Lord Low granted decree in *Duncan*,[11] on the sole evidence of confession by the wife *per* extract certificate of the birth of a child of which she stated to the Registrar her husband was not the father. Lord Moncrieff does not refer to this case, or to the next case of *Laidlaw*, in his impeachment of Fraser in *Stewart*.[12] *The Faculty*

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[9] (1859), 1 S. & T. 362, at p. 393.

[10] *Ramsay*, (1880) 17 S.L.R. 793, has been omitted. Oral confessions of intimacy by the guilty parties were held proved by parole evidence. The First Division, with Lord President Inglis giving the leading judgment, adhered to the decision of Lord Craighill, granting decree of divorce and awarding damages against the co-defender.

[11] 30 S.L.R. 435.

[12] 1930, 2 S.L.T. 363.

Digest includes *Duncan* under the heading of " Registration of the Birth of Illegitimate Child ". The rubric of the abstracted report ends :—" There was no other evidence ". The decision was in accordance with traditional practice. These registered birth extracts come in place of old kirk session writs and being official quasi-State documents practically supersede the intervention of kirk sessions unless for disciplinary ends.

Duncan was followed by the decision of Lord Stormonth Darling in *Laidlaw*,[13] granting decree against a non-appearing wife on the strength of an extract birth certificate signed by her.

It is unnecessary for the purposes of this article to cite all the confessional cases from English decisions since *Williams*.[14] They are useful for the variety of their circumstances in which admissions were made. One remarkable case may, however, be noted. In *Getty*, decided by Bucknill, J., in [1907] P. 334, decree of dissolution passed in favour of a husband on the strength of his wife's confession made in a letter that she had done wrong, some nineteen years before, with one whose name she would not disclose. This case is entirely in line with *Fullerton*. The written confession there of the wife equates with the extract certificate of the wife in the case of *Duncan* of the birth of a child to " an unknown man ". It also conforms to Scottish rules of evidence.

Mathieson, 1914,[14a] marks the first deviation, and a very singular one it is, in our law, through overlooking prior precedents cited by Fraser, and all the other cases of which notice has been taken. The only material evidence was documentary in the form of an extract registered certificate of the birth entry of an illegitimate child to the defender with the extract of an affiliation decree against the paramour. Seemingly amply sufficient as evidence of infidelity, it yet appeared to Lord Anderson as lacking in absolute conclusiveness. No one told him of *Campbell*, of *Fullerton*, of Fraser's views, and of the later and practically parallel precedents of *Duncan* and *Laidlaw*. Lord Anderson did not apparently consult Fraser or even *Sandeman's Digest*.

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[13] 1894, 2 S.L.T. 168.

[14] (1865) L.R. 1 P. & D. 29.

[14a] 1914, 1 S.L.T. 511.

Faced with *Muirhead*, and not apparently understanding its effect, that Judge, it is submitted, mixed up *ante litem* confessions with *post litem* admissions. Adultery must be proved, thought the learned Judge, independently of the confession, albeit *scripto*, of the wife, if not also of her paramour: so he looked around for some additional and corroborative evidence and he found it in *the non-appearance* of both wife and paramour! No other Judge, English or Scottish, had ever thought of that easy way: "they say nothing": very equivocal: and may be occasionally cover for an arranged "*non peccavimus*".

Such a course as Lord Anderson adopted meant nothing less than just granting decree of divorce *bona gratia*, and that directly in the teeth of the Statute of 1830.

It is now submitted that, barring this case of *Mathieson*, the decisions of the Inner House up to 1889 and the Outer House cases of 1893 and 1894 amply support the views I have always held of practice at the Scottish Bar in consistorial cases as regards extrajudicial confessions proved *scripto aut verbis*. So far *McDougall*,[15] and *Smith*, *cit. supra*, do not touch such confessions and throw no doubt upon their absolute conclusiveness. Indeed, upon examination of unextracted decrees in undefended divorce actions evidence could be recovered of not a few decrees passing on such *ante litem motam* confessional writings both prior and subsequent to 1893. Process inventories of productions would disclose in particular extract registered certificates of the births of illegitimate children. These with nothing else would tell their tale.

In *McDougall*, 1927, Lord Moncrieff held that adultery had not been proved, where:—

1. The paramour had obtained decree of affiliation and aliment *per* extract decree produced: admittedly proving itself;

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[15] 1927 S.C. 666.

2. The wife held a decree of judicial separation and aliment founding on the adultery disclosed by the bastardy decree; and
3. The paramour gave evidence.

But where there was:—

1. No admission, express or implied, by the husband prior to the date of raising the action;
2. No appearance for either defender or paramour; and
3. No intervention by the Lord Advocate after notice by direction of the Court.

Lord Moncrieff refused decree. It is unnecessary to set out his reasons as these are much more fully stated in *Stewart*, 1929,[16] to be dealt with later. Following the leading judgment of Lord Anderson, with concurrence of Lord Justice-Clerk Alness and Lords Ormidale and Hunter, the Second Division reversed his decision and granted decree.

I am not concerned with the peculiar grounds upon which that judgment was given. Apparently these subsume refutation of the law as laid down by Fraser and impugn the soundness of *Campbell* and *Fullerton*. The report is absolutely silent as to any reference to these decisions or to textbooks.

In *Smith*, 1928, Lord Moncrieff dismissed an action where there was, however, no extrajudicial admission either before or after proceedings had been raised and where admittedly the proof was *insufficient*. It is thought that here Lord Moncrieff was right. The Court under Lord Justice-Clerk Alness (Lord Hunter dissenting) reversed Lord Moncrieff on the ground that any insufficiency of proof was cured by the fact that both of the parties implicated had not actively opposed the action but had obligingly intimated by letter through their solicitors that they had no intention of doing so. Lord Hunter expressed himself to the effect that the Act of 1830 meant entirely to exclude such admissions.

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[16] 1930, S.L.T. 363.

Said Lord Alness :—

> "I, for myself, cannot figure any better evidence of adultery than that afforded by the letter"!

No doubt the Lord Justice-Clerk was right in treating it as an admission of guilt. But was he not wrong in accepting it as evidence of adultery within the purview of the Act of 1830? Inferentially and *a fortiori*, it is clear that if it had been made *ante litem motam*, Lord Alness would have followed *Campbell* and *Fullerton*. That Act of 1830 is still in force as shown by the Rules of Court. Beyond observing on this extraordinary way of using a solicitor's letter as a hitherto unknown kind of judicial plaster to fill up such a wide gap in evidence as, *ex concessu*, existed in *Smith*, both cases of *McDougall* and *Smith* may be left alone.

In *Stewart*, the third and most important in the train of similar decisions by Lord Moncrieff, the paramour signed the registered entry of the birth of a child to the husband of a pursuing wife. Lord Moncrieff agreed that the extract did infer against the party signing it as father of the child an admission on his part of paternity of the child. Expressing views in this case upon the accuracy and value of statements made by Lord Fraser in his Treatise, not apparent to any Judge prior to 1929, Lord Moncrieff refused decree. The salient points of his opinion need only be quoted :—

> ". . . I find that the only evidence of adultery which has been adduced by the pursuer is to be found in the extract of the birth of the child . . . . It is accordingly necessary to estimate the evidential value of the birth certificate. In estimating this value it must be kept in view that, according to the evidence of the pursuer herself, the writing in the register by the party professing to be the father of the child is the writing of the defender.
>
> "Such an extract from the register does not prove the facts set forth in the register (see Dickson on *Evidence*, section 1204) . . . . While the entry does not

prove the facts contained in the register, it accordingly does, on the other hand, prove against the person signing as father of the child an admission on his part of the paternity of the child.

"If the authority of Lord Fraser could be accepted as conclusive, such an admission, provided it be made extrajudicially (*i.e.*, before the raising of proceedings) and in circumstances which suggest no reason for suspicion, affords sufficient evidence *per se* and without corroboration to prove adultery as a ground for divorce (see Fraser, at p. 1172). Lord Fraser does not, however, profess to furnish his own authority for this *somewhat startling* proposition. He bases the proposition upon decisions of the Courts in England and Scotland which he cites and comments on in the two preceding pages. He presents the proposition only as an inference from these decisions. I have accordingly referred to and examined these decisions and have come to be of opinion that the inference drawn by Lord Fraser is unwarranted. As regards the Scottish cases, it appears to me that Lord Fraser does not fairly represent the effect of the decisions in *Campbell* and *Fullerton*, when he states that 'an acknowledgment or confession without any corroborative circumstances whatever' was accepted by the Court as sufficient proof of adultery. It is made as clear in the opinions of the Judges as in the rubrics of these cases that the acknowledgments or confessions *formed only a single element of the proof* . . . .

"*In my opinion extrajudicial admissions, whatever be their value for purposes of corroboration, can under no circumstances be accepted as sufficient proof of adultery when they stand alone*". (Italics *per* writer.)

No one could have cavilled with Lord Moncrieff if he had only suggested some misconception in the mind of Fraser. He had studied both cases of *Campbell* and *Fullerton* which alone Fraser cited in support of his statement of Scots law as regards confessions, and he might no doubt have excusably complained that Fraser had misled him by not quoting old Consistory Court cases. But should he not have himself found out that Fraser might have improved upon Lord Cockburn's opinion by stating that it not only reflected the law of Scotland but that such has been so in fact for more than one hundred years? Lord Moncrieff appears never to have inquired into the state of Scots law long prior to 1858, which was obligatory upon anyone doubting Fraser. Lord Moncrieff found that the cases of *Campbell* and *Fullerton* did not warrant the deductions made by Fraser from them. Without doubt, in my opinion, the criticism of Lord Moncrieff was wholly unwarranted.

Lord Moncrieff remarked that *Campbell* and *Fullerton* were special cases. *Campbell* was certainly, as already noted, in more than one sense a very special case, but not with the meaning attached to " special " by Lord Moncrieff. So far as it concerns, however, the conclusion to which the First Division came in 1860, it supports Fraser out and out. It was notably the last case in which proof was taken wholly by commission. All proofs on and after November 1, 1861, fell to be taken before the Judges themselves. The Court of Session had long before that become " the King's Great Consistory ". *Fullerton* was in no sense special.

Lord Moncrieff concluded his opinion thus :—

> " In this case I find that the *admission* of adultery, which falls to be *inferred* from the defender's signature to the register as evidenced by *No. 8 of process* is the *only* evidence of adultery which the pursuer has adduced. I shall therefore *refuse* decree and dismiss the action ". (Writer's italics.)

The decision of Lord Moncrieff in such an apparently plain sailing case was submitted to the Second Division. It was the duty of the Second Division, it is submitted, to decide this particular moot so sharply raised, not only in deference to Lord Moncrieff, but also out of respect to the memory of Fraser. All the Judges who took part in *Stewart* preferred, however, to take refuge in the " Anderson " by-pass. Full discussion was again avoided by an offer to lead further evidence. On such being led, the Second Division granted decree. Distinct reluctance was shown on the part of the Court formally to reverse the decision of Lord Moncrieff by giving a full and considered judgment. The Bar and the rest of the legal profession nevertheless got the impression that Fraser was somehow no longer authoritative just as the Second Division led them earlier by *McDougall* and *Smith* to the same conclusion. Definitive judgments are not only possible but are frequently given in undefended suits. The Bench was not precluded from consulting Fraser or otherwise researching into the law.

Plainly, Lord Moncrieff misconstrued the " *circumstances* " in both *Campbell* and *Fullerton* as being " *elements* " *instructing* adultery in place of their just establishing deliberation and good faith in acts done before public or semi-public officials. " Elements " are not always " essentials ".

Before dealing with *Barnes*, 1935, the last of Lord Moncrieff's reported cases in which divorce was refused by him, and the still more amazing case of *Mackay*, 1945, in which divorce was also refused by another Judge, it may be noted that the First Division disposed of a *peccavi* case in 1930, as Fraser, in his judicial capacity, would undoubtedly have done. It is extraordinary how this judgment was missed in 1935 by Lord Moncrieff himself and by the Judges of the Second Division. It is almost incredible that the Second Division should also have lost sight of how in 1934 they approved of and applied this judgment.

This decision of the First Division of October 17, 1930, is the case of *Creasey*.[17] It was pronounced unanimously. Fraser's opinions were expressly brought before the First Division : Lord President Clyde, and his colleagues, Lords Sands, Blackburn and Morison. Extrajudicial confessions founded upon were contained in a diary of the wife, couched in passionate language, clearly instructing adulterous intercourse between the wife and the co-defender. Lord

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[17] 1931 S.C. 9.

Mackay, finding the wife guilty of adultery with the co-defender, granted decree of divorce. The wife defended the action in the Outer House. The co-defender alone reclaimed, and successfully maintaining that the diary entries constituted no evidence *quoad* him, he was assoilzied.

This case is not so demonstrably clear as the cases of *Fullerton, Duncan* and *Laidlaw*. *Laidlaw* was mentioned in the debate. Without the aid of the diary entries, it was conceded infidelity could not have been held proved. A domestic proved that the co-defender was in the husband's house with the defender in his absence at times coincident with the diary dates, but her evidence did not instruct, substantiate or even *tend* to show guilt on the part of the wife. It was not necessary in support of the diary confessions for the purposes of decree against the wife. Of course the pursuer proved their handwriting as that of his wife. Lord Moncrieff seems to have overlooked that confessional proof of adultery is established by the confession itself. It is thus the evidence of only one witness and that the guilty party.

Lord Clyde, giving the opinion of the Court, *inter alia*, stated :—

> "The Lord Ordinary dealt with the statements in this diary substantially in the same way as the Court would do in the case of an extra-judicial confession. I think that was right. . . . The analogy between the statements in a diary thus abandoned by the writer of it and an extra-judicial confession is very close. And I think the Lord Ordinary was right in dealing with those statements as extra-judicial confessions by the wife".

Creasey follows implicitly the decision of the First Division in *Campbell*, and that of the Second Division in *Fullerton*. The First Division in this case had expressly in view the statements of the law as set forth by Fraser on the subject of extrajudicial confessions. Lord Clyde himself cited Fraser, Vol. II, pp. 1173–4, as approving of his statement that such confessions, while incriminating the wife and forming as they might and were in that case the only proof, did not by themselves involve the co-defender. Actually, p. 1172 of Fraser was also cited from the Bar.

Creasey bound all Outer House Judges. Yet, again, one notes with surprise that it is not cited in the Outer House cases of *Barnes*, 1935, and *Mackay*, 1945, either to the Lords Ordinary or to the Second Division when each case reached that Division. Had it been so cited, there would have been an excellent reason for calling in the First Division with a view to a larger Court reconsidering matters. The Second Division Judges, and for that matter all the Outer House Judges, can hardly have been unaware of *Creasey*.

Creasey was considered on March 6, 1934, in *Watson*,[18] by the Second Division, then consisting of Lord Justice-Clerk Aitchison and Lords Anderson and Murray. Lord Hunter was the other and senior member of that Division but did not sit in this case. There, on a reclaiming note at the instance of the wife against a deliverance of Lord Wark, it was debated whether a torn-up draft letter intended for the co-defender with an envelope addressed to him could be used in evidence against her. The torn-up pieces of the letter, when assembled, were in damaging terms. It was apparent that the facts upon which the pursuer relied for decree rested solely on this draft. The Second Division, Lord Murray giving the leading opinion, adhered to the opinion of Lord Wark. The case of *Creasey* was thus brought to the notice a *second* time of all Judges, whether sitting in the Inner or Outer House. On August 10, 1934, Lord Wark granted decree of divorce.

Notwithstanding *Creasey* and *Watson*, Lord Moncrieff in *Barnes*, 1935,[18a] for the fourth time dismissed an action for divorce at the instance of a wife, founding upon her husband settling an affiliation action by a £40 payment in exchange for a decree of absolvitor, coupled with evidence of the paramour in the proof and a letter from the husband to the pursuer's agent after the action had been raised admitting adultery with the paramour but denying paternity of her child. This case seems to have been fairly simple for the inference of adultery. No man pays money for an absolvitor of such a nature without to any mind, legal or lay, its inevitable significance. The reasons for refusal of decree given by Lord Moncrieff were that the evidence of the paramour was that of a single witness only; that the compromise of the affiliation action did not compromise the defender in any way; and that the case was distinguished from *Stewart*, in that the extract registered certificate of the paramour's child did not have the signature of the defender. The opinion of Lord Moncrieff in these circumstances was that the pursuer could not call in aid the defender's letter, despite the case of *Smith*.

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[18] 1934 S.C. 374.

[18a] 1935 S.C. 646.

The Second Division reversed the Lord Ordinary. Lord Justice-Clerk Aitchison with Lords Hunter and Anderson formed the Court. Lord Murray was absent. No additional evidence was required. The action being undefended, *Smith* was invoked: not a word about *Creasey*; no mention of *Watson*. The *ratio decidendi* seemed to be that if the proof could be regarded as in any way *insufficient*, the absence of any defence or opposition cured that *insufficiency*. Lord Anderson stated that the case was "much stronger" than *Smith*. It was!

Lastly, there is the case of *Mackay*, 1945,[19] where Lord Mackintosh refused decree of divorce. For the purposes of this article it is only necessary to quote the passage in his opinion with reference to "trite law" and that has already been done.

I have been unable to discover this "trite law" stated in any prior decision, or in any textbook or digest. Probably it derives from Walton on *Husband and Wife*, First Edition, 1893, and Second Edition, 1922. In the Second Edition, p. 47, it is stated: "Extra-judicial confessions . . . are important adminicles of evidence". In how many cases cited in this article have confessions constituted the sole proof of adultery? Walton was far out in discriminating between what constitutes proof and what he termed "*adminicles*", *i.e.*, *tending to show* but not *instructing* essential facts.

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[19] 1946 S.C. 78.

Mackay was reclaimed to the Second Division, composed of Lord Justice-Clerk Cooper and Lords Mackay and Stevenson, and is reported under this rubric :—

> "In an undefended action of divorce, the pursuer, a soldier, deponed that, while on military service overseas, which had continued *from January, 1943, until April, 1945*, he received a letter from his wife in Scotland in which she confessed to adultery with a Canadian soldier whose name she gave, and she enclosed an extract birth certificate relating to the birth of a child in February, 1944, *which bore to be signed by herself and the paramour as the parents.* The pursuer further deponed that, while in Scotland in April, 1945, on leave, he had on one occasion met the defender with a child who was not one of his family but that he had not cohabited with her. His evidence, along with the defender's letter and the extract birth certificate, was the only material evidence adduced. The Lord Ordinary dismissed the action on the ground that, as the defender's confession was not sufficient *per se* to entitle the pursuer to decree of divorce, the mere production of the extract birth certificate had not supplied the evidence necessary to corroborate the confession".

And the report concludes thus :—

> "The Court, while expressing agreement with the Lord Ordinary's reasoning and conclusions, in respect of a motion for the pursuer, who desired to explore the *possibility* of obtaining further evidence, recalled the interlocutor of the Lord Ordinary and remitted to him to take any *further* evidence that might be tendered".
> (Writer's italics.)

The report is destitute in citation of authority. No guidance is obtained from such a rubric with its reference to some "general agreement" on the part of the Bench with the views and decision of the Lord Ordinary. Not a single authority by way of judgment or textbook seems to have been mentioned in the course of debate, except, perhaps, that *Smith* was cited, but not pressed. It seems strange that neither the learned Judge nor the Division followed *Creasey* or even *Barnes*.

It is regrettable, too, that the Lord Ordinary had not brought before him at the outset an irresistible motion for decree in that the pursuer, upon the bare facts of the cause as regards his absence from his wife, had an indefeasible right to decree and that *apart from and independently* of confessional or any other kind of evidence. The illegitimate child must have been conceived about May, 1943. But, relating conception back other three months to March or February, 1943, an impossible time, the pursuer was not then in this country. The father must have been some other man. Was not this self-evident and irrebuttable proof of infidelity? How was this damning fact missed?

It was *pars judicis*, if the Judge or Judges considering the case were conscious of the facts, it is submitted, to grant decree of divorce, although not moved for. Litigants should not suffer from the oversight of their advisers.

With the knowledge of eighteenth century precedents, it was natural for me to turn to *Preston-Jones*, *supra*, in which Mr. Blanco White, K.C., Commissioner, was Judge. He did not accept the evidence of a medical man of experience in maternity cases and refused divorce in the absence of an "academic" opinion. The House of Lords considered this was not necessary and decree *nisi* of dissolution was granted. There the gestation period of 300 days was held to be so abnormal after the husband had left this country that the Law Lords held it was impossible for the plaintiff to be the father of his wife's child.

This case must satisfy Scottish lawyers of the soundness of the judgments in like actions of the old Commissaries of whom Lord Hermand had been one.

It is puzzling to account for *Creasey* and *Watson* not being remembered by the Court with Lords Mackay and Stevenson as members of it. And why the other proved and deadly point should have escaped the notice of all three Judges sitting on Saturday, November 27, 1945, is not easy to understand.

It is true this last and so obvious ground for divorce is not mentioned in Fraser or Walton. No one seems to have thought of looking up *Morison's Dictionary of Decisions* or other old records for light. Indeed, much of the confusion regarding confessional evidence has arisen through lawyers going no further back than Walton: 1922 Edition. It is doubtful whether any one of the Second Division Judges dealing with divorce actions during the period from 1935 to 1945 consulted Fraser.

The Lord Ordinary in *Mackay's case*, after more than one adjournment for *additional* evidence, was at last satisfied by the testimony of a young daughter of the pursuer that her mother and his wife had actually given birth to an adulterine. Decree of divorce was at long last granted.

Suggesting that, as clarification of the law is always welcome to the legal profession, the conflict both in law and practice shown as existing in *peccavi* cases should have more consideration by the Court, it is submitted, in conclusion, *as incontrovertible* that:—

1. The law of Scotland upon the evidential significance and value of confessions is correctly set forth by Lord Fraser in his 1878 Treatise on *Husband and Wife*; and
2. Decree of divorce falls to be granted on proof of absence of the husband from his wife for such a period, say 300 days, as puts beyond reasonable doubt any applicability of the maxim, *Pater est quem nuptiae demonstrant*, where the paternity of her child is in question: so recently determined by the House of Lords in the English case of *Preston-Jones* and so long ago in Scotland by cases like *Trail* and *Hall*.

G. W. WILTON.

FIRST IMPRESSIONS OF AUSTRIAN LAW[1]

II

Civil Law

THE phrase "civil law" applied to the legal system of a foreign State is an immensely wide one, covering presumably the whole residuary field left when Constitutional, Criminal and, possibly, Commercial law[2] have been deducted from the entirety of the system. It must, therefore, be obvious that an article of this kind cannot do more than glance at the barest outlines of the other system, endeavouring to indicate the types of rules which may be found there, rather than giving a string of concrete examples, necessarily picked at random.

The history of a country is a history of its law. Austria, however, was historically only a part of a larger entity, the self-styled "Holy Roman Empire of the German people". The law of this vast and loosely-knit entity was at first largely teutonic custom intensely local in its operation. The power of the earlier emperors was at first so weak as to give no opportunity for centralization and standardization, although as early as the twelfth century some attempt appears to have been made to "codify" (in the sense of reduce to written form) some at least of the immense number of local systems of law, which were then to be found in every little duchy, county or village.

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[1] The writer does not pretend to have made a detailed examination of Austrian law, but merely seeks to record some of the impressions left by attendance at a recent course on "the Outlines of Austrian law" conducted by the Karl Franz Universität of Graz. This article has been read and revised by my friend Judge Helmut Bader, Dr.Jur.(Graz), of the Landesgericht, Styria. He writes, "it was also examined by one of the presiding judges of the Court of Appeal, who is a really eminent authority on Austrian law". For previous article see *ante*, p. 50.

[2] At least, it is so regarded in Austria, where there is a separate Commercial Code, distinct from the Civil Code, and even separate Commercial Courts.

By the late fourteenth and fifteenth centuries, however, a marked tendency towards unification became visible, due in part at least to the comparative stability of the Empire and to the growth of Imperial authority. Not unnaturally, perhaps, in view of the time at which it took place, this "Unification" took the form not of the emergence of a teutonic "*ius gentium*" based on the highest common factor of the various local systems being superseded, but of a "reception" of the Roman law as enunciated in the "*Corpus Juris*" of Justinian. There can be little doubt that the claim of the Habsburgs to be the successors-in-title of the Caesars added considerably to the popularity of Roman law from the Imperial point of view. There were also the facts that Roman law, of a kind, was the only law taught at that time in European universities, and that commercial dealings between those residing in different jurisdictions were apt to be regarded as being governed by the provisions of Roman law. Finally, the ubiquity of the church and its Canon law, derived in many particulars from the Civil law of Rome, provided a convenient starting point for those who wished to see Roman law established as the common law of Europe.

A big practical step towards the implementation of this theoretical and doctrinal reception was the establishment of the *Reichkammergericht*, or Supreme Court of Appeal for the whole Empire, in 1495. Unlike its modern counterpart, the Judicial Committee of the Privy Council—to draw what I hope is a harmless analogy—this tribunal did not seek to apply the law of the particular jurisdiction from which the appeal had come, but applied the rules of the *Corpus Juris* instead as an Imperial common system. The process of superseding local customary law (mainly teutonic) by an external system was bound to be a slow one and it is not until the eighteenth century that one could describe the law—at least of the hereditary dominions—as pure Roman law. The latter half of that century saw a very limited reaction in favour of "native law" probably inspired by

Voltaire, but matters in Austria were already too far advanced for this to have any marked effect. Indeed, the Empress Maria Theresia put the ascendancy of the Roman law on a very firm footing by setting up a commission to codify the law of her " Austrian " dominions.[3] This led, after a provisional try-out in Polish Galicia under her son Joseph II (1780–1790), to the Civil Code of 1811 which was put into force in that year throughout the Austrian dominions and, in Austria proper, has remained so ever since. Indeed, since that date only three amendments have had to be made,[4] surely a remarkable testimony to the excellence of the original drafting, largely the work of Professor von Zeiller, a native of Graz. The continuity of the Code, which remained in force even during the Nazi rule of Austria, is in marked contrast to the unhappy impermanence of Austria's constitutions already referred to. Moreover, it has formed a model for the Codes of a number of other States. The German Civil Code of 1900, which in a sense completed the work of the 1811 Austrian one, bears so much resemblance to the latter one, that when, after 1938, the Nazis ordered that it should be in force in Austria as well as the A.B.G.B.,[5] no conflicts to speak of needed resolving, and very little change was effected in the internal law of Austria.[6] The Civil Code of Luxemburg is the A.B.G.B. practically taken *verbatim* as it stands.

For those who are not brought up under a Code system, it is perhaps necessary to explain that the Civil Code does not purport to cover in detail the whole ground of " Civil law ". There have been quite a number of separate statutes since the 1811 Code, dealing, *e.g.*, with negotiable instruments, the protection of children, and so on. These special laws supersede, so far as they go, the more general rules of the Code, which, however, remains always in the background as a sort of enacted " common law ". Reference is made to the "rule in the Civil Code" in much the same way as we are accustomed to say, "the rule at common law is (or was)". Customary law, *i.e.*, common law in the English sense of the term, is only valid in such a system if it is expressly referred to and recognized as existing by the Code.

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[3] Including all the hereditary dominions of the Habsburgs except Hungary, and thus vastly more extensive than the present " Austrian " Republic.

[4] Those of 1914, 1915 and 1916.

[5] As the Austrian Code is usually called.

[6] An exception being the law of marriage (see *infra*, p. 161).

The authority of precedent can scarcely be said to exist at all. In an Austrian court it is very rare indeed for a previous decision to be quoted in argument. The arguments, in so far as they exist at all, take the form of a logical analysis of the particular paragraph of the Code, which is in question, and its applicability or otherwise to the facts before the court.

Even the decisions of the Supreme Court of Cassation at Vienna are not binding as a general rule upon inferior tribunals. If, however, a bench or "senate" of twelve of the judges agree that a particular decision is specially worthy of notice, they can direct that the speeches, et cetera, be formally recorded in the *Spruchrepertorium* or official report of the court. If a precedent is so recorded, it becomes an obligatory portion of Austrian law, binding even the Supreme Court which made it, with the proviso, however, that if a full session of that court, consisting of at least twenty members, so decides, the precedent may be overruled and removed from the report. This procedure has perhaps more of subordinate judicial legislation about it than of any idea of precedent binding as such.

An eminent Austrian authority[7] has remarked that Austrian civil law of today may be correctly described as being 90 per cent. composed of Roman law, the balance being partly modern legislation, partly (to a very small extent) odd survivals of old Germanic custom, *e.g.*, the doctrine which exists in Austria on the lines of the English "Market Overt", that a thing bought in a public shop by a *bona fide* purchaser is exempted from the principle "*non dat qui non habet*". An illustration of the general preponderance of Roman law details, as opposed to Roman law principles (which of course exist in most legal systems in Europe), is found in the survival of that curious (at least to modern English minds) title of the Institutes "*De excusationibus*".[8] Any Austrian called upon today to perform a public office, such as that of executor (in the Austrian sense) or guardian, can plead that he is the father of four children—including those killed in action—as could the provincial Roman of the time of Justinian.[9]

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[7] Mr. Justice Bader.

Perhaps it is in the sphere of the law of Status, which forms the first part of the Civil Code, just as the book "*De iure personarum*" did of Gaius's textbook so many centuries before, that the most remarkable survivals of Roman law are to be found. The Austrian child from birth to the age of seven is totally incapable of any legal act. His father or guardian must act for him. Between the age of seven and that of fourteen, he can act, alone if it be solely to his advantage, with the authority of his father or guardian if elements of possible liability are present. A boy of fourteen may make a valid will, though until he attains the age of eighteen, it must be a "public" will, made, that is, before a court or notary public. Though the subordinate status of *filiusfamilias* has gone, these rules correspond directly with the corresponding ones in Roman law. Even the rather harsh rule that a mother may not act as guardian of her infant children has survived.[10]

The law as to presumption of death in Austria presents some interesting features. Unless a death certificate is produced, an Austrian can scarcely be said to be "legally" dead. When a fire broke out at the State Opera House in Vienna in 1883 during a performance of the "Tales of Hoffman", and many of the bodies of the 800 victims could not be identified, a special law (*Ringtheater-gesetz*) had to be passed allowing death to be presumed in the absence of a certificate in certain cases. If a person over twenty-five years of age is unheard of for ten years by his nearest relatives, they may get leave from a court to presume his death if there was some danger to life, *e.g.*, a war or the plague, in the district where he was last heard of as alive. In the case of a soldier on active service, his death may be presumed if he has not returned after one year after the termination of hostilities. This rule has a tragic significance in Austria at the present time, as so many soldiers disappeared without a record of any kind in the fighting in Russia—probably having lost their lives, but quite possibly prisoners, or even deserters from Hitler's army.

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[8] Inst. 1. 25.

[9] It does not seem to be clear how ancient these grounds of exemption were in Roman law. They are not referred to by Gaius in his discussion of tutela (Inst. 142–200) but possibly a further title on the lines of that of Justinian's has been lost through a *lacuna* in the manuscript as Gaius's §§ 199–200 correspond to the *principium* of Justinian's previous title (1.24 "*De satisdatione tutorum et curatorum*").

[10] Legislation is now (1950) in view to change this, at least as far as the unmarried mother is concerned

The "old chestnut" of the soldier who returns from the war to find his wife has presumed his death and married again is solved in Austria in a distinctly logical way. If she had obtained official permission to presume her first husband's death, she remains in law married to the second man, subject to a right to "divorce" him on the grounds of mistake, but only in order to return to her first husband. This seems a fairer solution than the English law doctrine that she remains tied to the first husband, although excused the criminal penalties of bigamy; and the position in Scotland which would appear to be somewhat similar.[10a]

This is a provision of the German law of marriage, which, alone of Nazi introductions, has remained in force after Austria has regained her independent status. This is due to the rather unhappy history of marriage laws in Austria. Under the terms of the Civil Code rules on this subject, a marriage might be celebrated either in church or by a civil ceremony. The pro-clerical Dolfuss régime, however, made the Canon law rules on this subject, which declare a church ceremony obligatory, binding on its Catholic subjects (95 per cent. of the population). For this reason, and also because of the Canon law rules prohibiting divorce, the

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[10a] See the view expressed in *Walton on Husband and Wife*, 3rd ed., at p. 122.

German marriage law, which goes to the other extreme and makes a civil ceremony obligatory in every case, has proved more popular—and therefore more lasting—than Hitler's other innovations. The rules prohibiting "interracial" marriages between Jews and non-Jews have, of course, been repealed.

The Austrian marriage law, as at present in force, is a strange mixture of very old Roman law rules and some very modern ones. An example of the former is that an uncle may marry his niece (though only with a special dispensation from the president of the appropriate *Landesgericht*) because of an infatuation of the Emperor Claudius (41–54). There is a rule which prohibits the marriage of a divorced person with the other party to the adultery which was the cause of the divorce—a rule which Scottish lawyers will compare with the terms of the Act 1600, c. 20. A good modern rule (in the writer's opinion) is that which prohibits the marriage of males below the age of twenty-one, females that of eighteen. These may be reduced to eighteen and sixteen respectively by special dispensation.

Very considerable traces of the survival of the *minutiæ* of Roman law are also to be found in the sphere of the *Ius Rerum*. For example, the period of acquisitive prescription by a *bona fide* possessor of movables (*usucapio*) remains at the three years' period established by Justinian in 531.[11] For immovables, it is thirty years, which is also available to possessors of chattels who have not the necessary good faith for the shorter period (*longissimi temporis præscriptio*)[12]. For the transfer of title in movables, the Roman law *traditio* is still almost always necessary. Gifts between husband and wife are not absolutely prohibited, as they were in Roman law, but must take place in a specially formal manner, before a notary.

As in most Civil law systems (*e.g.*, Scottish law) the law of land or "immovables" shows the least survival of Roman law of any branch of the system. This is probably due not so much to any deficiency of the Roman law of land, as to the rigour of non-Roman customs of land holding, which did not yield so pliably to the Reception as other branches of the law. The Austrian land law is not, however, based on the principles of feudalism familiar to Scottish and English practitioners, but on a particularly early development of registration of title, which was beginning to be important in Austria even before the end of the Middle Ages. The land registers already existing were put on a regular, official basis and the whole system unified by the "*tractatus de juribus incorporalibus*" of the Emperor Leopold I dated March 13, 1679. The work was completed by a further statute of September 25, 1795.

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[11] Cod. 7.39.8.

[12] Under the present system of registered title, it is impossible to be the *bona fide* possessor of another's land. Hence "*longi temporis praescriptio*" is impossible.

The system is based on a rigid requirement of registration, not merely of the title to land, but of every document relating to any right in land. The principal volume (*Hauptbuch*) sets out the parcels of land in each of the districts coming within the court's jurisdiction.[13] Under the heading of each parcel are set out the official description and condition of the land, the name of the owner with the *causa* by which he got it briefly referred to, and finally any third party rights over the land in question. A second set of volumes (*Urkundesammlung*) contain certified copies of the documents referred to as the origin of the rights in the *Hauptbuch*. Both sets are open to examination by any member of the public without cause shown, so that intimate private documents, wills and settlements are necessarily common knowledge. Another defect of this system is that no copies of the register books have been kept in the past. Consequently, the destruction of two of the registries by fire during the war brought chaos to the land rights in the districts concerned—particularly as the parties may have failed to preserve their original documents of title, as they would naturally be thought to be of no further importance, once they had been registered.

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[13] Each register is attached to a *Bezirksgericht*, or district court.

The Austrian law of succession presents a generally Roman law appearance, with a few individual rules. Thus the *heres* must make a formal *aditio* in order to complete his title to the inheritance. Certain classes of persons, *e.g.*, professed religious, lack completely the capacity to be heirs. Others have only a relative incapacity, *e.g.*, those who have been guilty of crimes against the deceased or committed adultery with him—though in this latter case only if it has been already proved in a criminal court.[14] Another curious rule is that if the testator has died without those near relatives (spouse, children, and in Austria, parents) who are entitled to claim a portion of the estate as their *legitim*, the State takes this portion rather than the general legatees under the will.

The *Ius Actionum* (procedure) is the sphere in which there is most difference between the Civil law and the Common law systems. The English litigant in an Austrian court would be astonished by many features of the action. The judge has no Master, and so handles all the preliminary stages of the action himself. He not only may, but must, make himself thoroughly familiar with the facts of the dispute, the contentions of the parties and even the evidence with which they are going to support those contentions, from the "file" of documents connected with the case. Nay, in the interest of the sanctity of the oath, he should make up his mind beforehand which party is going to tell him the truth and only allow that party to be sworn. It is his unavoidable duty to report the matter to the Public Prosecutor if his judgment is, in effect, a finding that one of the parties has told a lie on oath.

The atmosphere in an Austrian court is extremely informal by British standards. Sometimes counsel address the judge while seated—often they interrupt one another. The writer has seen counsel during a High Court action get up from his place, his hands in his pockets, and stroll to look out of the window—presumably to indicate indifference to the arguments that his adversary was then addressing to the court. This informality, however, means that in criminal cases, the accused is not in a railed-off dock, but on an ordinary chair near his counsel, and is addressed by the court as " Herr X ".

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[14] Adultery is still a crime in Austria and prosecutions for it are by no means obsolete.

Perhaps the whole difference is best summed up by the facts that the Supreme Court of Cassation of Vienna has not sat in public since 1870. Working entirely from " paper " evidence, it is addressed by counsel in writing, and finally gives judgment by way of a written decree despatched to the parties and their counsel.

The general conclusions of an English student who has only been able to make a somewhat superficial acquaintance with Austrian Civil law may be summarized as follows :

1. Austrian law presents a general similarity to other Continental systems in its emphasis on a Code and its general lack of recognition for " precedent " as a source of law. The latter is particularly noticeable, there being practically no published reports of cases, not even such as those which form an important item in French legal life, though not of course on the English principle of " authority ".

2. The continuity of Austrian legal thought from the *Corpus Juris*, which may very well account for the supreme importance attached to the Code, comes out over and over again, not only in fundamental methods of thought (which are shared by all predominantly Roman law systems, *e.g.*, Scottish law), but in the retention of many curious illogicalities of detail, whose *raison d'être* must be sought (if anywhere) in the tangled legal history of ancient Rome.

3. Land registration in Austria is so long-established a commonplace that its non-development in Great Britain (except in London and a few odd localities) is a matter of incredulity to Austrian lawyers. On the whole, the system works well and there is little that an English lawyer can say by way of excuse for its continued absence in this country.

4. The reverence of Austrian law for the oath, its abhorrence of adultery, the recognition of the "civil death" of monks and other religious, reflect the continuing loyalty of Austria to the Catholic church, but its official rejection of that church's view of marriage shows that too imperative demands must not be made upon this loyalty.

5. Austrian procedure is so different from ours as to render comparison almost meaningless. The gap which separates their system from that familiar in England is very wide indeed, and whatever unification of private law may be eventually obtained, it is exceedingly unlikely that much progress will be made in the direction of procedure.

C. d'O. Farran.

RECENT LEADING SCOTTISH CASES

By David M. Walker, M.A., LL.B., Advocate

STATUTORY INTERPRETATION.

As a mere matter of decision *Nicol's Trs.* v. *Sutherland*, 1951 S.L.T. 201, does no more than affirm the First Division and repel the challenge to the well-established authority of *Robertson* v. *Thomson*, 1900, 3 F. 5, to the effect that, despite what section 100 of the Bills of Exchange Act, 1882, might appear to say, parole proof that a bill has been paid is incompetent in Scotland. The dissent of two of the noble and learned Lords may, however, raise doubts whether the meaning of the section is really as clear as the decision and the weight of prior authority might indicate. More important are the general observations on statutory construction. It appears that little reliance can be placed on the fact that subsequent amending statutes have left in its original form the section challenged, as it has been interpreted in the later judicial decisions thereon. This is of scant value, unless the particular section was under consideration in the amending Acts (as it was not here), or was actually re-enacted.

Amendment of the Act in other particulars does not therefore amount to legislative sanction of the earlier judicial interpretation. Furthermore, the fact that for fifty years the mercantile community has accepted as good law a section as it has been judicially interpreted will not prevent it being overruled, where no title has been built on that interpretation, nor have dispositions of property with a long tract of future time come into being on the faith of the judicial interpretation now challenged. To this extent, then, the principle that the interpretation adopted should not interfere with vested rights (*Maxwell on Statutes*, pp. 85, 135) must be limited.

NEGLIGENCE —Liability to person on property " as of right ".

The difficulties arising from the trichotomy of invitee, licensee, and trespasser have not yet been fully expiscated. This rigid division is possibly alien to Scots Law but since *Dumbreck* v. *Addie's Collieries*, 1929 S.C.(H.L.) 51, it has been part of our law; moreover that case is authority for the view that there can be no more than the three traditional classes. Yet Winfield (*Textbook of the Law of Tort*, 5th ed., 558) gives four categories, superimposing on the usual three the category of those who come on premises by right of contract. The question arose in *McPhail* v. *Lanark County Council*, 1951 S.L.T. 32, whether a person present on premises by constitutional right came within one of the three existing categories or into a fourth hitherto undefined. In that case an elector broke her ankle in a school playground after recording her vote in a municipal election; she sued the town council, whose town clerk had acted as returning officer and made the polling arrangements, and also the county council who owned the premises, averring that she was an invitee. Against both she was unsuccessful. It was held that the triple classification of *Dumbreck* was exhaustive and on that basis the question which had to be decided was into which category could be fitted a pursuer who came on the premises in the exercise of her public and constitutional right of voting. The First Division held that the proper class in the circumstances was that of licensee, and rejected the contention that a person entering " as of right " came into any other or fourth category. The category of licensee accordingly includes persons such as this pursuer who have come on premises " as of right ", by virtue of overriding statutory authority and independently of the occupier's consent, and also, as the Lord President usefully pointed out, such persons as police officers in pursuit of a criminal (but in *Great Central Ry.* v. *Bates*, [1921] 3 K.B. 578, a constable entering premises " to see that everything was right " was held to be neither an invitee nor a licensee) and officials with powers of entry and search (cf. the inspectors in *Lawrie* v. *Muir*, 1950 J.C. 19). Moreover the " neighbour " rule of *Donoghue* v. *Stevenson*, 1932 S.C.(H.L.) 31, was rejected as not applicable to dangerous land and structures (cf. *Otto* v. *Bolton*, [1932] A.C. 562), just as the Court of Appeal has recently held that it applies only to physical damage and not to pecuniary loss resulting from an accountant's negligent reports: *Candler* v. *Crane, Christmas & Co.*, [1951] 1 All E. R. 426. The general application of *Donoghue* to heritable property would involve occupiers in much more onerous responsibilities and also overturn large tracts of established law. It appears then that there are at least two kinds of licensees—those present by permission or acquiescence, and those who come on duty or of right even though unwanted. Winfield (*op. cit.* 576) will no doubt be grateful for this answer to a very interesting problem.

COMPANIES —Reduction of capital—Relevant considerations.

Many considerations which go beyond the realms of strict law have contributed to the frequency with which the Courts have today to consider whether or not to grant petitions by companies for confirmation of reduction of capital. Coal nationalisation has resulted in many such petitions. In *Westburn Sugar Refineries, Ltd.*, 1951 S.L.T. 152; revd. (H.L.) 1951 S.L.T. 261, reduction was to be effected by returning to shareholders not money but an equivalent nominal sum in the form of shares in an investment holding company created by the petitioning company, the shares in which had apparently a greater actual than nominal value. The Court of Session took the view that confirmation should not be granted of what was evidently a device of the petitioners to put valuable surplus assets beyond the reach of threatened nationalisation. The House of Lords nevertheless confirmed the reduction holding that, if the transaction were itself competent, the Court should only refuse confirmation if what was proposed was somehow unfair or inequitable, having regard to the interests of creditors, shareholders and the investing public: contingent nationalisation is not within the public policy to which the Court should attend. But *quære*, if nationalisation were actually in train but not yet effective, *e.g.*, between the introduction of legislation and vesting day? A not dissimilar point arose in *A. & D. Fraser, Ltd.*, 1951 S.L.T. 273, where capital was at one stroke increased by the creation of new shares fully paid out of capitalised reserves and immediately reduced by paying out certain shareholders and the now reduced capital consolidated and further new (unpaid) shares created. The First Division refused by a majority to confirm this reduction holding that the whole scheme was a device to enable shareholders to evade taxation by drawing out large sums from profits in the guise of capital repayments. The Lord President, however, dissented, taking the view that the Court's discretion did not extend to considering questions of evasion of taxation, a view which seems to accord with the speeches of the Lords in *Westburn* (*supra*). Both decisions indicate a divergence of views on the true function of the Court as confirming authority, whether it is limited to considerations of the competency and regularity of the procedure and the interests of persons directly affected financially, actually or contingently, or whether it may consider to any extent the wider public interest. The judgments of the House of Lords in *Westburn* favour the former view : in the latter event who is to define the public interest and how widely is the scrutiny to extend ? It may be questioned, moreover, whether the avoidance of present taxation is *in pari casu* with precautions against as yet merely contingent nationalisation. There is a material difference between the actual and the possible contingency, and in recent years the Courts have not considered it meritorious for taxpayers to discover methods within the strict letter of the law whereby they avoid bearing their fair share of taxation ; see Lord Greene in *Howard de Walden* v. *I.R.C.*, [1942] 1 K.B. 389 ; Viscount Simon, *obiter*, in *Latilla* v. *I.R.C.*, [1943] A. C. 377, 381.

DIVORCE—Mental cruelty—Relevancy.

Divorce for mental cruelty alone is fairly rare in Scotland and uniformly unsuccessful. *Jamieson* v. *Jamieson*, 1951 S.L.T. 174, goes some way to clarify the subtle differences between this and the commoner action of cruelty based on physical *sævitia*. The salient features are that where there is mental cruelty unaccompanied by any element of physical violence there must be much graver and weightier reasons before divorce will be granted and the mental cruelty must be unmistakable and, in general, persistent and calculated. Furthermore, in mental cruelty, the guilty spouse must either intend to hurt the other or at least be unwarrantably indifferent as to the consequences to the victim ; the cruelty must be " directed against " the victim. Thus neglect, lack of consideration, insults, and the inadequate provision of housekeeping money do not add up to a relevant case of mental cruelty, while, just as much as in physical cruelty, there must be a deleterious effect on the pursuer's health and reasonable apprehension of recurrence of the cruelty and of consequent further danger to the pursuer. It seems therefore that there will be few circumstances where mental cruelty alone will suffice to obtain divorce.

CONTRACT—Restraint of Trade—Covenants against resale.

Post-war conditions are also reflected in *British Motor Trade Association* v. *Gray*, 1951 S.L.T. 247, where the petitioners' " covenant " scheme to restrict the " black market " in used cars was unsuccessfully challenged as being in restraint of trade. This indicates again how far the law has swung round from the original common law position that all restraints on free trade were contrary to public policy and so void; *e.g.*, Lord Macnaghten in *Nordenfelt*, [1894] A. C. at 565. When one adds to this the statutory monopolies and the restrictions imposed on many trades by the requirements of licences and allocations there would seem to be little left of the common law rule; is it too being swallowed by public policy?

RECENT LEADING ENGLISH CASES

By Andrew Rankin, B.A., B.L., F.R.E.S., Barrister-at-Law

NEGLIGENCE —Contributory negligence— Running down action—Duty of plaintiff towards traffic.

The Privy Council had occasion to consider *Davies* v. *Swan Motor Co., Ltd.*, [1949] 2 K.B. 291, in *Nance* v. *British Columbia Electric Ry. Co., Ltd.*, [1951] 2 All E. R. 448. It will be recalled that in *Davies' Case* the Court of Appeal held that a plea of contributory negligence means that the party against whom the plea is aimed failed to take reasonable care for his own safety and contributed, by that want of care, to his own injury. In the course of his judgment in that case Denning, L.J., said " When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist who is going at an excessive speed any duty to avoid being run down ". In *Nance's Case* the Privy Council were unable to agree with this statement. As it is our respectful view that *Nance's Case* will be followed by Courts in this country, we can do no better than quote from the Report:

" This, however, is not to say that in all cases the Plaintiff who is guilty of contributory negligence owes to the Defendant no duty to act carefully. Indeed, it would appear to their Lordships that in cases relating to running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle ". Their Lordships further held that a plea of contributory negligence under the Law Reform (Contributory Negligence) Act, 1945, should be treated as covering want of care by the plaintiff for his own safety and situations where the plaintiff owes a duty to the defendant.

NEGLIGENCE —Invitee—Duty of occupier—Protection against " unusual danger "—Workman falling from staging.

When *Horton* v. *London Graving Dock Co.*, [1950] 1 All E.R. 180, reached the House of Lords ([1951] 2 All E.R. 1) the House was called upon to provide the solution of the much discussed problem of the distance to which the burden imposed by the decision in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, is to be carried and in what manner the *dictum* of Willes, J., at p. 288, is to be interpreted. Is the duty of an invitor to an invitee to take reasonable care to make the premises safe for the invitee however manifest the risk may be, or is it a sufficient discharge of his duty if he takes reasonable care to make the premises safe or bring home to the invitee knowledge or notice of the danger?

Lord Porter pointed out that the words of Willes, J., are not embedded in a statute, but that they were carefully chosen and often acted on. He further pointed out that what Willes, J., declared to be the duty is, not to prevent unusual danger, but to prevent damage from unusual danger. " It is in this consideration, as I think, that notice or knowledge becomes important. Either may prevent damage, though the unusual danger admittedly exists. As I take this view, I find the question what is unusual danger of less importance than it might otherwise be considered. To my mind, danger may be unusual though fully recognised, and I am not prepared to accept the view that the word ' unusual ' is to be construed subjectively as meaning ' unexpected ' by the particular invitee concerned. . . . I think ' unusual ' is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises ". Lord Porter then dealt with the extent of knowledge of the invitee. He accepted the contention that an invitor's duty to an invitee is to provide reasonably safe premises or else show that the invitee accepted the risk with full knowledge of the dangers involved. In dealing with the latter view of the duty is it necessary for the invitor to show that the invitee knew of the danger and the risk or must he go further and show not only that he knew of it but also willingly undertook the risk? Lord

Porter held that it was sufficient for the invitor to show only the first of the two alternatives.

DIVORCE—Insanity—Care and treatment " continuously " for five years.

In *Frank* v. *Frank*, [1951] 2 All E. R. 503, the Court of Appeal considered the meaning of " continuously under care and treatment " and the proper construction of section 3 (*a*) of the Matrimonial Causes Act, 1937. The decision is yet another illustration of the contest between a literal interpretation and a liberal and reasonable interpretation of an Act of Parliament. The respondent wife was first admitted to hospital under a reception order on October 12, 1945. Later she was removed to Scotland and after about eighteen months she was returned to England.

Section 3 of the Act of 1937 provided that ". . . a person of unsound mind shall be deemed to be under care and treatment (*a*) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890–1930 . . ." In England, when a person of unsound mind is removed from one hospital to another a removal order is made under the Acts of 1890–1930. In the case of a transfer from a hospital in England to a hospital in Scotland or *vice versa*, there is no order which makes detention under the Acts operative during the journey from one to another. Could it be said therefore that the respondent wife had been continuously under care and treatment?

In answering the question posed by the appeal Somervell, L.J. (with whom the other Judges concurred) held that it was Parliament's intention that periods in England and Scotland could be added together to make up the period of five years. " It would, I think, be defeating the obvious intention of section 2 (*d*) of the Act of 1937 if one treated as a breach of continuity something which must necessarily happen if the contemplated transfer . . . takes place ".

RECENT PRIVY COUNCIL CASES

By Colin Clayton, of the Middle Temple, Barrister-at-Law.

PERSONAL INJURIES: "Contributory negligence."

Nance v. *British Columbia Electric Ry.* ([1951] 2 T.L.R. 137) was an appeal from a judgment of a Court of Appeal for British Columbia arising out of an action which the appellant brought claiming damages for herself and other dependants for the death of her husband, which was caused by his being struck by a street-car belonging to the respondents at or near the intersection of two highways in the City of Vancouver in January, 1949. The jury found that the death of the deceased man was due entirely to the negligence of the driver of the street-car, and judgment was entered for the appellant for $35,000, the sum found by the jury. In the Court of Appeal that sum was reduced to $12,000. In the course of his summing up the trial Judge said: "Before you can find that Nance was guilty of contributory negligence, you must find that he owed a duty to the defendant, and that he committed a breach of that duty, and was, therefore, negligent. The onus of proving contributory negligence is upon the defendant, and that must be proved by preponderance of evidence, which you are prepared to accept".

The three Judges of the Court of Appeal were unanimously of the view that the judgment below could not stand, but for widely different reasons. Chief Justice Sloan held that the passage quoted above was a misleading and inaccurate exposition of the obligations of the deceased. He thought that the deceased owed no "duty" to the respondents, but was subject to an imperative obligation to exercise reasonable care for his own safety, and that he was at fault in not keeping a proper look-out for the approaching street-car. Judge of Appeal O'Halloran took the view that the jury would have failed to act judicially if they had not reached the decision that the driver was solely responsible, and held that the Judge's charge was entirely correct. He added, "the argument that in crossing the street the deceased owed no duty to the street-car is one which I have struggled unsuccessfully to appreciate ". While holding the respondents solely to blame, he thought that the damages awarded appeared to be " purely arbitrary and without foundation in the evidence ", and was in favour of a new trial on quantum. Judge of Appeal Sidney Smith also took the view that there was no contributory negligence by the deceased, and was not prepared to accept the view that a pedestrian crossing a street owed to approaching traffic the duty to be careful. But he considered that the award of damages was excessive and thought that a figure of more than $12,000 could not be justified.

The Board said that the statement that, when negligence was alleged as the basis of an actionable wrong, a necessary ingredient in the conception was the existence of a duty which the defendant owed to the plaintiff to take due care was indubitably correct. But when contributory negligence was set up as a defence its existence did not depend on any duty which the injured party owed to the party sued, and all that was necessary to establish such a defence was to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. But that was not to say that in all cases a plaintiff who was guilty of contributory negligence owed no duty to the defendant to act carefully. It appeared to the Board that in running-down cases like the present such a duty existed. The proposition could be put even more broadly. Generally speaking, when two parties were so moving in relation to one another as to involve risk of collision, each owed to the other a duty to move with due care, and that was true whether they were both in control of vehicles, or both proceeding on foot, or whether one was on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. When a man stepped from the kerb into the roadway he owed a duty to traffic which was approaching him with a risk of collision to exercise due care. If the sentence in Lord Justice Denning's judgment in *Davies* v. *Swan Motor Co.* (*Swansea*), *Ltd.* (65 T.L.R. 278, at p. 284; [1949] 2 K.B. 291, at p. 324), " When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down ", was to be interpreted in a contrary sense, the Board could not agree with it. They did not feel able to accept the view that the pleadings in the case debarred the respondents from objecting that the passage complained of in the summing up was wrong in law. The plea that the deceased was guilty of contributory negligence was wide enough to cover the contention that he was careless of his own safety even though he did not owe a duty to the respondents to be careful. In British Columbia the conception of contributory negligence was the same as in this country. Such a plea should be treated as setting up want of care by the plaintiff for his own safety, whether in the circumstances of the accident the plaintiff owed a duty to the defendant or not.

To decide whether the impugned passage in the summing up vitiated the conclusion of the jury, it was necessary to have regard to the summing up as a whole. The misdirection occurred early in the Judge's charge; it was followed by a full and careful survey of the evidence to which no objection could be taken, and which placed the essential issues before the jury very clearly. Moreover, the question put at the end of the summing up on contributory negligence was correctly framed and contained no suggestion that the defence would be incomplete unless "duty" was proved to the jury's satisfaction. The Board came to the conclusion that the error complained of did not mislead the jury and that the verdict that the respondents were solely to blame should stand. The Board then discussed the quantum of damages, said that they were satisfied that a jury could not reasonably have computed the total recoverable damages at a figure exceeding $22,500 and awarded that sum.

FORGED MORTGAGE DEEDS: Doctrine of Estoppel.

Fung Kai Sun v. *Chan Fui Hing and Others* ([1951] 2 T.L.R. 47) was an appeal from the Supreme Court of Hong Kong arising out of an action which the respondents, as plaintiffs, brought for a declaration that two mortgages relating to certain land and buildings in Hong Kong which purported to have been made by the respondents in favour of the appellant were forgeries and were null and void. At the trial the mortgages were held in fact to have been forged. The respondents owned property in Hong Kong. About the beginning of 1939 the manager of the property—to whom the title deeds were entrusted on his appointment in 1933 and who remitted the rents and submitted accounts to the respondents—fell into arrear with the remittances. It transpired that the manager had fraudulently mortgaged the property by means of forged instruments to the appellant, whose first intimation that the mortgages were alleged to be forged was when the writ was served on him on June 23, 1939. The respondents had known for some three weeks before the issue of the writ that the mortgages were forged. The appellant contended, *inter alia*, that the respondents' silence deprived him of the opportunity of obtaining restitution from the forger and that accordingly they were estopped from saying that they had not executed the deeds.

The Board held that the respondents were not entitled to withhold from the appellant information that his mortgages were forgeries, and that when they chose to do so they took the risk that they would later be estopped from asserting that the deeds were forged if by reason of their keeping silent the appellant suffered detriment. The further question, therefore, was whether the respondents, having delayed from June 1 to June 23 to inform the appellant that his mortgages were forgeries, caused him any such detriment as would give rise to estoppel. The only detriment suggested was that if the appellant had been informed on or about June 1 he might have been able to take some more effective action to minimise his loss than was possible after June 23; and the only action which he could take would have been action against the forger or his property. The Board discussed this question and said that, for the appellant to succeed, the chance of recovery must have been materially prejudiced by the delay. In their opinion the appellant had not shown that he was so prejudiced, and that accordingly no estoppel arose.

The appellant further argued that, when the respondents discovered the true facts, it was not enough to disclose to him that the mortgages were forgeries; as they knew who the forger was they were under a duty to give him that information also, and if they failed to do so to his detriment they must on that account now be estopped from maintaining that the mortgages were forgeries. It was said that the purpose of requiring prompt information of the forgery to be given was to enable the person who held the forged document to recover as much as possible of what he lost by proceeding at once against the forger, and therefore where there was any duty to speak it must be a duty to give all information in the informant's possession which would assist the person holding the forged document to work out his remedy against the forger.

In the judgment of the Board that argument was based on a misconception of the nature of estoppel. The question was whether the respondents were to be estopped from proving one particular fact—that the appellant's mortgages were not their deeds—and the reason why a person was estopped from proving a particular fact was that, instead of disclosing it when he ought to have done so, he concealed it or made some misrepresentation about it. He could not now be heard to say something which he ought to have said sooner. But their Lordships could find neither principle nor authority to support the proposition that, although one party might have clearly stated to the other at the right time the fact which he now wished to prove, yet he would be estopped from continuing to assert that fact because he had withheld some other information which it was in his power to give. The respondents asserted in June that the appellant's mortgages were not their deeds; they were not then estopped from asserting that fact and they could not now be estopped from continuing to assert it. The appeal was accordingly dismissed.

EXPULSION FROM TRADE UNION: Rule as to appeal.

White and Others v. *Kuzych* ([1951] 2 T.L.R. 277) was an appeal by Mr. William Lloyd White and Others, who represented the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, from a majority judgment of the Court of Appeal for British Columbia, dated May 3, 1950, which had dismissed their appeal from a judgment of Mr. Justice Whittaker, dated September 22, 1949, holding that the respondent, Mr. Myron Kuzych, a welder, had not been validly expelled from the appellant union and awarding him $5,000 damages.

Mr. Kuzych, who was opposed to the principle of the " closed shop ", was charged, *inter alia*, with having in breach of article 26 of the by-laws of the union " committed acts discreditable to it in publicly opposing established policies of the union by campaigning against the closed shop principle ". The Press and Investigating Committee of the union, which inquired into the charges, found Mr. Kuzych guilty, and in accordance with the by-law reported their finding to a general business meeting, which passed a resolution expelling Mr. Kuzych from the union. The by-law also contained the following provision, headed " Appeals " : " If a member has been found guilty by a general business meeting of any offence . . . and feels that the decision is unfair, or the penalty too severe, he may, within 60 days, file an appeal in writing with the executive of the Shipyard General Workers' Federation ; . . .".

The oath of obligation taken by members of the union provided : " I promise that I will not become a party to any suit at law or in equity against this union or the federation until I have exhausted all remedies allowed to me by the said constitution and by-laws ".

Mr. Kuzych brought his action for damages for alleged wrongful expulsion from the union without first appealing to the federation.

The Board stated that it was a crucial circumstance in the litigation that it was instituted by the respondent without first appealing to the federation from the findings against him in the report and resolution of expulsion subsequently adopted at the general business meeting. The Board discussed the contentions and said that in their view the trial committee was properly constituted and that the conclusion reached at the general meeting was a " decision " which was subject to appeal. That was the appeal which the respondent was bound by his contract to pursue before he could issue his writ. He had not done so, and on that ground the appeal should be allowed.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, B.A., LL.B., Advocate

NEGLIGENT MISREPRESENTATION

" There can be little doubt ", an editorial note in the *Law Quarterly Review* for April, 1951, declares, " that *Candler* v. *Crane, Christmas & Co.*, [1951] 1 T.L.R. 371, will give rise to more debate than any other case in recent years ". Although the statement may be slightly exaggerated, the case is certainly an interesting one. Without, however, the dissenting opinion of that bold Judge, Denning, L.J., it would be less interesting, for it is hard to see how the majority of the Court of Appeal could have reached any other conclusion as the law at present stands.

The plaintiff had invested a sum of money in a company on the strength of accounts prepared by the defendants, a firm of accountants, and produced to him by their employee. The accounts had been carelessly prepared and were seriously inaccurate, and the result was that the plaintiff lost the money he had invested. He brought an action claiming damages for negligence, but the action was dismissed on the ground that the accountants were under no duty of care towards him. His appeal was also dismissed, Asquith and Cohen, L.JJ. holding that they were bound by *Derry* v. *Peek* and *Le Lievre* v. *Gould*, and that the authority of those decisions had been in no way affected by *Donoghue* v. *Stevenson*.

It may seem anomalous that a person should be liable in tort for putting out defective goods, but not, in the absence of fraud, for putting out defective statements. But the law is full of anomalies, and negligence is a branch of law where it is especially dangerous to place too much reliance on arguments by analogy. One reason why negligence in act supports an action of damages, while negligence in word does not, may simply be that as a general rule the former has more socially dangerous consequences than the latter.

In his dissenting opinion Denning, L.J. distinguished *Derry* v. *Peek* on the ground that a professional man was not there involved, and *Le Lievre* v. *Gould* on the ground that the misstatement there, although the defendant knew that third persons might act in reliance on it, was not made specifically to the plaintiff, whereas in *Candler's Case* the accounts were drawn up by the defendant's employee expressly for the use of the plaintiff. Both Professor Goodhart and Mr. Harry Street, in a note in the *Modern Law Review* for July, 1951, support the dissenting opinion. Perhaps it is not unfair to say that their view of what the law ought to be has persuaded them, like Denning, L.J., of what the law in fact is. For it is very difficult to see how a way round *Le Lievre* v. *Gould* can be found, or to find any flaw in the reasoning of Asquith and Cohen, L.JJ. *Derry* v. *Peek* and subsequent cases have firmly established the principle that non-fraudulent misrepresentation affords no cause of action, except where there is either a contractual or a fiduciary relationship between the person making the misrepresentation and the person who suffers from it. The rule may or may not be just, but it has undoubtedly the advantage of being clear and definite. Thus if a solicitor, for example, gives bad advice to a client the latter may sue him, but a third party to whom the advice was communicated could not, however careless the solicitor had been and however much hardship the third party had suffered.

It is rather curious that none of the English Judges or academic writers on this subject appears to have noticed the case of *Robinson* v. *National Bank of Scotland*, 1916 S.C. (H.L.) 154, although it went to the House of Lords. A cautioner, who had been compelled to pay the whole amount of a loan which he had guaranteed, brought an action against a bank, on the ground that he had been induced to become cautioner by reason of a misrepresentation as to the financial standing of his co-cautioner contained in a letter written by a bank agent to another bank in response to an inquiry about their credit. It was held that the statements in the letter, though inaccurate and misleading, were not dishonest, and therefore that the bank was not liable, there being no duty on the bank agent to make sure that the representation was accurate. It is true that in this case the representation, like that of the surveyor in *Le Lievre* v. *Gould*, was not made directly to the pursuer. But, as Lord Loreburn, L.C., said: " The writer meant to influence those persons who should be interested in providing the contemplated loan. The pursuer was such a person, and he was undoubtedly induced by the letter to give his name as surety. He was none the less induced by the letter that it was not, in fact, either addressed to or seen by him." There does not seem to be any good reason in logic, or otherwise, why it should make any difference that the misrepresentation is addressed to a class of persons which includes the person aggrieved and not specifically to him. To take the converse case, if a fiduciary relationship exists between A on the one hand and X, Y and Z on the other, and A makes a negligent representation to X, which X repeats to Z, involving the latter in loss, surely A will be liable in the same way as if X had suffered the loss.

The most interesting question that arises out of *Candler* v. *Crane, Christmas & Co.*, the editor of the *Law Quarterly Review* observes, is not what the law at present lays down, but whether the duty of care which exists where there is a fiduciary relationship should be extended generally to statements made by professional men to persons relying on their skill. On this point there is a good deal that might be said both for and against. In the circumstances of *Candler's Case*, as in those of *Robinson* v. *National Bank of Scotland*, the rule which prevented the plaintiff from recovering damages obviously worked harshly. On the other hand, it would introduce considerable confusion into the law, which at present has the merit of certainty, if it were altered. Cases can easily be imagined in which a slight degree of carelessness on the part of an accountant, or surveyor, or other professional man, would involve him in liability to an incalculable extent to an indefinite number of persons, and it would be very difficult for Courts to determine who could sue him and who could not. There would surely have to be some limit to the liability. And why should this new load be fastened on the backs of professional men only, and not on those of business men, too?

In an article, also contained in the April, 1951, number of the *Law Quarterly Review*, Dr. W. L. Morison points out that, although there is no general duty to exercise care in making statements on which others may be expected to rely, a distinction may perhaps be drawn between statements causing physical damage to persons or property and statements causing economic loss. In the former case, in contrast to the latter, there are a number of *dicta* which might be taken to support the proposition that liability exists, although there is no direct authority in favour. Dr. Morison thinks that in some cases at least it may be confidently supposed that there is a duty of care where the damage complained of is physical.

This is highly doubtful, and if it were true it would appear to be an unsatisfactory state of affairs. There are reasons why liability should be affirmed in case of carelessness in act, but denied in case of carelessness in word. Morally, there may not be much more to be said for the owner of a car with defective brakes who lends it to a friend, representing that it is safe to drive, with the result that a third party is injured, than for a car owner who himself runs someone down owing to his defective brakes. It may, however, be justifiable in law, as a matter of policy and expediency, to differentiate between the two, and to award damages against the second man while absolving the first. There would be no end to the actions which might be brought against a person if all the world could make him responsible for every incautious expression of opinion. There is something to be said for holding that loss resulting from carelessness in word is always too remote, for the chain of causation in these circumstances is never simple.

On the other hand, it seems to be contrary to principle that liability should depend on the kind of loss that is incurred by the aggrieved party. Once negligence is established, a wrongdoer should be responsible for all the damage flowing from the wrongdoing, so long as it is not too remote. And in determining whether there has been negligence or not, there should surely be no differentiation between a person who foresees that physical damage may be caused to another and one who foresees that another will suffer financial loss. Although the distinction between carelessness in act and carelessness in word may perhaps be just as arbitrary, it has the advantage from a practical point of view of being clear-cut, whereas the other would lead to uncertainty. It could not be maintained that every careless misrepresentation, followed by physical damage, should involve liability. As Dr. Morison says, that would be far too sweeping a rule. He goes no further than to say that a duty will be, or ought to be, recognised in circumstances where the blameworthy act consists of a misrepresentation, " if the duty can be defined by analogy to a recognised duty or by amalgamation with it, and can be stated in a way which does not involve explicit reference to the fact of the misrepresentation ". That is an odd sort of duty. Surely Dr. Morison's formula is equivalent to saying that misrepresentation *per se* does not involve liability. He quotes, as showing that liability may depend on a misrepresentation having been made, an Australian case where a customer in a hotel, owing to the carelessness of a barmaid in directing him to the lavatory, fell down an unguarded lift-well in the dark. The hotelkeeper was held liable on the ground that the negligent misrepresentation had made the customer an invitee in a part of the building where otherwise he would have been a trespasser. But this type of case is of no value in establishing that misrepresentation, followed by physical damage, may by itself involve liability. If the accident to the customer had occurred outside the hotel he could not have succeeded in his action. The hotel-keeper was made liable because he was barred by the fault of his employee from maintaining that the customer was a trespasser at the place where the accident happened.

THE CONSEIL D'ETAT

The question of the judicial powers exercised by Ministers, or by administrative tribunals, has been continually increasing in importance, and is sure to go on increasing, a trend of affairs which has had the result that a number of people have given their support in a more or less tentative way to the idea of establishing an administrative court of appeal in this country, which would exercise a supervisory jurisdiction over such tribunals and perhaps have a general jurisdiction in actions involving private persons on the one hand and government departments on the other. It is natural therefore that interest should be taken in the Continental system of administrative justice, and particularly in the French *Conseil d'Etat*. Two articles in recent numbers of the *Canadian Bar Review* (February and April, 1951), by Dr. Bernard Schwartz, a well-known authority on administrative law, who is at present doing research work at the *Faculté de Droit* in Paris, give an illuminating view of the French administrative courts.

Dr. Schwartz points out that the difference between Continental and Anglo-American practice, in so far as the organs in which are vested the control of administrative practice are concerned, can be attributed to differing interpretations of the doctrine of the separation of powers. Whereas the turning point in English constitutional history was the successful assertion of their powers by the legislature and the judiciary against the executive, French constitutional theory has been affected by the memory of judicial interference with administrative action. The necessity of destroying the *Parlements* was one of the dominant ideas of the Constituent Assembly of 1789, and a law of August, 1790, laid down that, under penalty of forfeiture of office, Judges must not interfere in any way with the workings of administrative bodies, or summon administrative officials before them in the exercise of their duties. The only remedy left to private citizens against administrative oppression was by way of appeal to the *Conseil d'Etat*, set up in 1799, which dealt, as a minor part of its functions and as a matter of policy rather than of law, with individual grievances. As early as 1806 this state of affairs was found to be unsatisfactory, and a judicial section of the *Conseil* was instituted. The separation between the administrative and judicial branches was carried further and further by gradual stages until the judicial section became, as it at present is, substantially a court of law in the full sense of the term, although a court of a very special character.

The *Conseil d'Etat* has a total membership of about 160, of whom half belong to the judicial section, which is divided into eight subsections, each sitting normally as a separate court. The other members of the *Conseil* are divided among four administrative sections, each concerned in an advisory capacity with a certain number of related government departments. No member engaged in non-judicial activities is permitted to share in the ordinary work of the judicial section. But the separation of the two branches is not absolute. Thus, while it is the duty of one of the administrative sections to examine a draft bill or administrative regulation submitted by a government department, advice to the Government is formally tendered by the *Conseil* as a whole, the judicial members participating as well as the administrative members. On the other hand, some of the administrative members may be called upon to take part in the determination of certain cases of particular importance and difficulty. There is also some exchange of personnel between the two branches. The members (apart from a few extraordinary members), both administrative and judicial, have complete security of tenure and do not depend in any way on ministerial favour for their promotion. The majority enter the *Conseil* as young men and remain in it during their whole careers.

The *Conseil d'Etat* as a judicial body exercises both original and appellate jurisdiction. It is a court of first instance in every case in the field of administrative law, except where jurisdiction has been expressly conferred on some other administrative tribunal, every administrative decision in France being subject to judicial challenge before an administrative court. Where the subject has a remedy before some other tribunal, the *Conseil d'Etat* is vested with appellate jurisdiction. Thus, directly or indirectly, it has cognizance of every action brought against the administration. The other administrative courts of first instance include the twenty-two *Conseils de Préfecture*, whose competence has been extended to cover cases involving most of the acts of local administrative bodies, as distinguished from the departments of the Central Government. There is also in France, as in other countries, a great variety of tribunals dealing with cases arising out of specific administrative activities. It is hardly surprising to learn that the work of the *Conseil d'Etat* has increased to such an extent in recent years, and even since the last war, that it cannot keep up with the influx of cases. Proposals are under consideration at the present time to transfer original jurisdiction, in almost all cases, to the *Conseils de Préfecture*, making the latter tribunals of general first instance jurisdiction and the *Conseil d'Etat* an appellate tribunal.

There are thus in France two quite distinct sets of courts, the one to dispose of disputes between private citizens, the other to deal with cases in which the administration is involved. The relationship between the two may be said to be analogous to that which formerly existed between the common-law and equity courts in England. There can be no doubt of the prestige and effectiveness of the *Conseil d'Etat* as a guarantee of the rights of private citizens. Now is it to be doubted that it protects private citizens better than the ordinary courts could, partly because of its more expert and specialized knowledge, partly because it is not bound by a rigid code as the ordinary courts are, but has developed a body of case law on the same lines as the courts in this country? Still, however effective the French system of administrative justice may be, it is questionable whether it could be successfully translated to a common-law country, or whether it is desirable that the fundamental principle of the supremacy of our courts should be disturbed in cases involving government departments by the institution of specialized courts co-ordinate with them. The tendency here and also in America as the Crown Proceedings Act of 1947 and the Federal Administrative Procedure Act of 1946, for example, show, is in a different direction. Measures are being taken, although perhaps not yet very far-reaching measures, to strengthen the control of the ordinary courts over Ministers, and to separate the judicial functions exercised by government officials from those functions which are properly executive.

Periodicals also received : *The Law Journal, Informacion Jurídica, University of Western Australia Annual Law Review, Connecticut Bar Journal, Modern Law Review, La Justicia, Baylor Law Review, Revista Jurídica de la Universidad de Puerto Rico, Western Political Quarterly, Revue Internationale de Droit Comparé, American Journal of International Law, Oklahoma Law Review, Memoria del Señor Decano del Colegio de Abogados (de Lima), Año 1950, Anglo-Soviet Journal, Vol. XII, No. 2.*

RECENT LITERATURE

A Handbook of Husband and Wife according to the Law of Scotland. By the late F. P. Walton, K.C. (Quebec), Advocate. Third Edition by W. E. R. Hendry and A. M. Johnston, Advocates. 1951. Edinburgh : W. Green & Son, Ltd. Price £3 15s. net.

Twenty-nine years have elapsed since Sheriff (later Lord) Wark brought out the second edition of the then twenty-nine-year-old *Walton*. Since 1922 and even more so since 1893 our consistorial law has not stood still. The position of married women has changed very materially in that time (cf. Montgomery, *Ninety Years of Progress*, in (1947) 59 Jur. Rev. 173), and the activity of the Legislature has been substantial in many parts of this field of law. In particular there have been the Divorce (Scotland) Act, 1938, and the Marriage (Scotland) Act, 1939. The post-war flood of divorces has given us new tracts of case-law while the peculiar circumstances of some war-time marriages have posed many interesting problems.

In these circumstances a new *Walton* had become essential, the more so as in those recent years we have moved far beyond the older practice discussed in Lord Fraser's two monumental volumes. Fraser will remain our great, almost institutional, authority but he has lain unrevised since 1878 and while the broad principles are little changed, our modern consistorial law and practice are very substantially different. While much harks back to the older law and the canonists on which Fraser founds, much now depends on the interpretation of recent statutes and it is rare to have to look in Carpzovius and Sanchez. Practitioners and students will therefore be ready to extend a warm welcome to this edition.

The learned editors and their several assistants have given us an edition which brings the statement of the law down to the beginning of the present year and several even more recent points have been noted. They have rightly treated Walton's text as not being sacrosanct and have therefore omitted altogether the chapters relating to matters now almost entirely of antiquarian interest, such as *jus mariti*; similarly, the account of English matrimonial law has been dropped but instead there appear *passim* footnote mentions of the chief respects in which the English law diverges from our own and these should prevent the unwary from seeking English authority in vain. Further, the editors have rightly not defaced the text by putting their alterations in square brackets, a practice only justifiable when handling the text of the greatest jurists, and one always ugly and distracting to the eye. Whole new chapters have been added to cover the changes introduced by the Divorce (Scotland) Act of 1938 and the decisions thereon and very much more has been substantially rewritten.

The net result is highly satisfactory; the citation of Scottish authority is very complete and many pertinent recent English cases are also mentioned where they bear on matters substantially common to both countries; *Osman* v. *Campbell*, 1946 S.C. 204, might possibly, however, have been mentioned on p. 249 and artificial insemination (p. 55) is missed in the index, but these are details which only emphasise the general accuracy and completeness. Recent statutory developments are likewise fully covered, such as the Children Act, 1948, the Legal Aid Act, 1949, the Law Reform (Misc. Prov.) Act, 1949, and the Maintenance Orders Act, 1950, and there are also mentions of the chief articles in periodical literature relevant to the subjects. Nor have the editors shrunk from criticism, noticing the difficulties attendant on the *ratio* of *Crawford*, 1946 S.L.T. 138 (p. 84), and the grounds for doubting the statements made in earlier editions (p. 138) even despite the high authority which these derived from the original author and his previous editor.

The seven chapters dealing with the Private International Law aspects of the subject have been very substantially rewritten and now give valuable guidance on those thorny topics. Among these the chapter on jurisdiction is particularly valuable in view of the recent extensions of the grounds.

Not the least valuable feature of the appearance of this edition at the present time is that, as marriage and divorce are about to fall under the surveillance of a Royal Commission, the members thereof will have available to them in this book a concise, accurate, and thoroughly modern statement of Scots law on the subject.

The publishers also deserve commendation for a volume which represents a distinct advance on its predecessors in standards of book production.

Palmer's Company Precedents. Sixteenth Edition by His Honour A. F. Topham, K.C., LL.M., Bencher of Lincoln's Inn. PART I, General Forms. 1951. London: Stevens & Sons, Ltd. Price £5 10s. net.

Company Law has assumed a complexity and importance not disproportionate, when it is realised how essential a part it plays in our commercial structure. Developing through statute, case-law and ordinary business usage, Company Law has received a great accession to its volume and scope by the passing of the 1947 Act, followed by the Act of 1948. As the Statute Law now stands, while there is in some instances simplification, and in others co-option into the Act and endorsement of a great deal that rested on practice, new and onerous enactments have been introduced.

In the result, the practitioner must look for guidance to the specialist, when called upon to translate theory into practice. *Palmer's Precedents*, which have always held high place in the sphere of Company Law and administration supply the answer.

The present edition, though of necessity changed from the set-up of previous editions, maintains its high standard of usefulness. What is superseded by the latest legislation has been deleted and new forms and explanatory notes have been introduced to cover the new provisions of statute. *Palmer's Company Law* now, in the editor's conception, becomes a Supplement to the Precedents.

The legal profession is in debt to the learned editor and his assistants for the completeness of the revision, and for all the practical help available in as short form as the circumstances permit. We have here an invaluable contribution to the practitioner's library.

Part I concerns itself with bringing a company into existence and the administration of its affairs while in being.

The issues of Part II (Winding-up) and Part III (Debentures) are awaited with interest.

Bowstead's Digest of the Law of Agency. Eleventh Edition. By Peter Allsop, M.A., of Lincoln's Inn, Barrister-at-Law. 1951. London : Sweet & Maxwell, Ltd. Price £2 10s. net.

The learned editor of the previous edition of this standard work observed that there was a vast amount of learning and criticism upon the subject of Agency to be found in extra-judicial writing, such as the American Restatement and articles in the law reviews of every country where English common law was applied; and that to collate this with Bowstead's work would enhance its value as a leading textbook. This work of collation, impossible in the circumstances of the last year of the recent war, has now, with the result which he anticipated, been carried out by his successors.

The well-known general form of previous editions, in which statements of principle were set out in separate articles and illustrated by appended summaries of the facts and decisions in numerous cases, has been retained. Certain of the articles have, however, been re-arranged. The important topic of agency of necessity is now dealt with in a separate article, points of principle formerly embodied in illustrative cases are set out as distinct propositions, and various matters relating to the constitution of agency, previously dealt with in four separate chapters, are appropriately grouped in one chapter. These changes serve to emphasise the well-planned lay-out of the work and practitioners, for whom it is primarily intended, and students, to whom also it is invaluable, will have no difficulty in finding the guidance and assistance which they seek.

In substance, the work has been brought up to date, some ninety cases decided during the past twenty-five years have been added, and the extra-judicial writings mentioned above have been incorporated, chiefly by reference. That the new material thus added is very substantial in amount will appear from the fact that the book has been extended by some sixty pages.

Scots lawyers may, as Scotsmen, be enraged to read that " ' foreign principal ' means a principal who does not reside or carry on business in England or Wales " !—and disappointed to find that the decisions added include only one decision of their own Courts. On the other hand they will, as lawyers, recall that the law of agency is the same in Scotland as in England, and will welcome this new edition of a book which is the standard work, and in fact the only up-to-date textbook, on a subject of great practical importance.

The Sense of Injustice. By Edmond N. Cahn, Professor of Law, New York University School of Law. New York: University Press, New York; London: Geoffrey Cumberlege, Oxford University Press. Price 28s. net.

In this volume Professor Cahn sets out to treat law from what he sees as a somewhat new angle. He calls it an anthropocentric view. Philosophy of Law has to treat its subject from an abstract aspect because it is concerned with the general principles involved. He suspects that this conceals the fact that in its application it is concerned entirely with people of flesh and blood, and that it is such persons who are liable to its compulsions. The three essays of which the book is composed, two of which had already appeared in American Law Journals, deal with contrasts which are involved in any discussion of law. He points out that this is necessary because it is in these antitheses that the human element comes into play. He contrasts Justice against Power, Freedom against Order and Change against Security. In presenting these topics, he draws illustrations from many sources, philosophical as well as legal. Most frequently, perhaps, he brings in controversies which have exercised American social life, but classical and Biblical wisdom is almost as often, if not quite so often, at his service. His conclusion is that the sense of the danger of suffering injustice is a necessary corollary of the maintenance of a stable community, in order to harmonise the operation of the opposing factors he has figured at the outset.

Cases on Mercantile Law. By J. Charlesworth, LL.D., of Lincoln's Inn, Barrister-at-Law; Recorder of Middlesbrough. 1951. London: Stevens & Sons, Ltd. Price 21s. net.

The learned author of the *Principles of Mercantile Law*, the seventh edition of which was published recently, has now prepared this companion volume of cases "likely to be useful to students of the subject". It is intended for use in conjunction with the *Principles*, and its contents are conveniently grouped under the same general headings. The citation of each case is followed by a statement of the general principle which the case establishes or illustrates, a short account of the facts and decision, excerpts from the opinions of the Judges, and notes explaining qualifications of the principle and summarising or citing other cases to which reference may be made.

The cases selected include both leading cases and cases which are convenient illustrations of the principles involved. No fewer than one hundred and fifty decisions are thus digested, and some three hundred and fifty are summarised or cited in the notes. To present so much material in so small a compass is indeed a very considerable achievement, and the author is to be congratulated on his powers of discriminating selection and lucid and succinct exposition, and the publishers and printers on producing a book matching the *Principles* in format and attractiveness.

Students of the mercantile law of Scotland will find here in brief but adequate outline such well-known authorities as *Derry* v. *Peek*, *Hadley* v. *Baxendale*, *Keighley, Maxsted & Co.* v. *Durant* and *De Bussche* v. *Alt*: and they will study with profit the other decisions on matters common to the legal systems of Scotland and England, namely, sale of goods, negotiable instruments, carriers—including the recent Scots case of the *Monarch Steamship Co.*—insurance and partnership. Beyond these, however, they should not seek to go until they have mastered the principles of their own system and can distinguish the points of divergence which still exist between the laws of the two countries.

Benjamin on Sale. Eighth Edition. By the Hon. Sir Donald Leslie Finnemore, one of His Majesty's Judges of the King's Bench Division, and Arthur E. James, of the Middle Temple, Barrister-at-Law. 1950. London : Sweet & Maxwell, Ltd. Price £5 10s. net.

Nineteen years having elapsed since the preparation of the seventh edition of this classic treatise, the publication of this new edition will be welcomed by all who, engaged in the study and practice of this most important and difficult branch of the law, have longed for an edition incorporating recent changes; while the fact that the senior editor became during its preparation one of His Majesty's Judges gives the work special authority.

In form, the book is readily recognisable by all familiar with previous editions, for, as is pointed out in the preface, it was decided that no more changes than necessary should be made, so as to retain as much as possible of the original book; and in fact the only change to be noted is the disposition of the contents of each chapter under sub-heads which, with the side-titles, table of contents and comprehensive index, make the whole of the vast amount of material readily accessible.

The principal changes in substance are the inclusion of a new chapter on the seller's liability to third parties for negligence—necessitated by the decision of the House of Lords in the Scots case of *Donoghue* v. *Stevenson*—and the exposition of the developing legal conception of frustration and its consequences, now treated as a separate topic. The import and effect of the Law Reform Acts of 1934 and 1935—printed in a new Appendix with the Law Reform (Frustrated Contracts) Act, 1943—are discussed, and a wide selection of recent decisions, including the Scots case of *Rutherford & Son* v. *Miln & Co.*, has been incorporated. Most of the law is, of course, common to both Scotland and England, but it may be remarked that in this work, written and edited by English lawyers, the matters peculiar to Scots law, namely, the rights of the buyer, the meaning of "warranty", and the alteration of the law affecting the passing of the property in the goods, are noted and explained.

It is idle to commend further a treatise which has long since secured a place amongst the legal classics : one can but tender to the learned editors sincere congratulations on the accomplishment of labours which have earned the gratitude of the legal profession and ensured that to all, practitioners and students alike, *Benjamin on Sale* remains truly indispensable.

The Action on the Case. By A. K. Kiralfy, Ph.D., LL.M. 1951. London : Sweet & Maxwell, Ltd. Price £2 10s. net.

This book is written by a specialist for specialists, and they will recognise in it a notable contribution to legal historical research. It is built upon the foundation of the author's thesis for the Doctorate of Philosophy of the University of London, and it bears clear traces of its origin in the prodigious documentation of every statement by references to the judicial records between 1300 and 1700, unpublished as well as published, and in "a certain dryness and terseness of style" which the author excuses by pleading the historian's desire to show caution in dealing with a subject "not yet ripe for more popular treatment".

Until quite recent times the student of legal history was taught that English Law only escaped ossification in the moribund husk of the Register of Writs as a result of two factors—the Statute *in consimili casu* and the Chancellor's equity jurisdiction. This view has come to require qualification. First came the discovery of the important part played by the *querela sine brevi*, to which the Selden Society devoted their sixtieth volume; and Dr. Kiralfy has now furnished a mass of evidence indicating the greater significance to be attached to the Action on the Case, independently altogether of the Statute of 1285. With pardonable enthusiasm for his subject Dr. Kiralfy describes the Action on the Case as "perhaps the most important single achievement of English Common Law". We leave it to the Anglo-American jurists to assess the validity of this claim, but it is plain enough that the Action on the Case played no inconsiderable part in bridging the gap between medieval and modern law.

To a lawyer trained in the Romanist tradition the features of special interest revealed by Dr. Kiralfy are (i) the astonishing number and variety of unusual causes of action unearthed from these early English records, and (ii) the fact that "very few demurrers were used in the leading cases which built up the law of actions on the case". If the process described in this book had taken place in Scotland of the eighteenth century, every decision would have been a decision on relevancy and probably keenly contested. But the answer probably is that the process described took place before the eighteenth century, and that Scotland is not England.

We would venture only one criticism of the learned author. He is far too modest. Judging by the magnificent apparatus of Tables and Appendices with which his book is furnished, his familiarity with the sources and authorities must be equalled by very few; and we could wish that, having digged so deep and with such fruitful results, he had turned aside to build, and had risked a few generalisations and expository conclusions less guarded and limited than those which he offers. But we must await the fulfilment of his promise to return to the subject at some later time.

The Rent Acts. By R. E. Megarry. Sixth Edition. 1951. London: Stevens & Sons. Price £2 10s. net.

In the Preface to the Fourth Edition of this now standard work, the learned author disclaimed any intention of "this book becoming an annual penance, either for me or for others". That was in 1948. For all that, a new edition followed in the middle of 1949, and now here is another, dated April, 1951. There are major changes in the text and—such is the spate of litigation—over 350 new cases have been added. The Table of Cases extends to forty pages of print. One wonders how Mr. Megarry finds time to read all the Reports, even without the additional labour of writing. No wonder he suggests that this almost annual rewriting of his book was a labour which might suitably have been selected by Eurystheus as one of the Enterprises of Hercules!

The book falls into two main parts. The first is a textbook exposition of the law. This occupies almost two-thirds of the six hundred-odd pages of the book, and is written with that lucidity which is the hall-mark of everything Mr. Megarry does. Nor is it an easy task to be lucid, for the Acts are sometimes models of obscurity while the relevant judicial decisions are voluminous, difficult and at times contradictory. Through this maze Mr. Megarry threads his way with apparent ease, and also at times with humour. The second part of the book consists of a reprint of the relevant Acts and Statutory Instruments. These are printed in such a way as to show the effect of subsequent legislation. This again is a great boon, as everyone will agree who has had to jump about from Act to Act in an endeavour to find out what the statutory provision is upon some point or another. Moreover the Acts reprinted include not only the Rent and Mortgage Interest Restrictions Acts, but also such statutes as the Building Materials and Housing Act of 1945, the Furnished Houses (Rent Control) Act, 1946, the Housing Act, 1949, and others.

It is, of course, for English practitioners that this book has been written and it is only they who will obtain full benefit from it. Thus the additional Statutes above mentioned are not all applicable in Scotland, though they all have Scottish equivalents. One wonders, however, whether Mr. Megarry might not have extended his "Tables of Classes of Houses" on p. 138 so as to show the requisites for old and new control in Scotland as well as south of the border. As for the case-law, there is a very full citation of Scottish decisions, including Sheriff Court cases, which will be of value to the profession north of Tweed. Meantime we can but hope that one day we will have a new "Fraser" and, for the present, be thankful that Megarry is available to help us with some, at least, of our problems.

The book is beautifully produced, and the only comment one has on that side is that it would have been helpful to have in the Table of Contents a list of the Statutes, etc., which appear in the Appendices.

The Inheritance of the Common Law. By Richard O'Sullivan, K.C. The Hamlyn Lectures. Second Series. 1950. London: Stevens & Sons, Ltd. Price 8s. net.

The first series of lectures under the auspices of the Hamlyn Trust was delivered in 1949 by Lord Justice Denning. His lectures were entitled *Freedom under the Law* and they were of such outstanding merit and so highly relevant to the contemporary scene that one inevitably felt that the Hamlyn Trustees could not expect the standards of scholarship and practical wisdom which had been set by their first lecturer to be maintained by those whom they invited to follow him. By his four lectures entitled *The Inheritance of the Common Law* Mr. Richard O'Sullivan has completely dispelled any doubts that one may have had on that score. The Hamlyn Trustees must again be congratulated on their choice of lecturer.

In his four lectures Mr. O'Sullivan deals with The Concept of Man in the Common Law, The Family, The Political Community, and Law and Conscience. Mr. O'Sullivan is doubly qualified to speak on these important subjects for he is not only a great Common Lawyer but he is steeped in the Christian tradition in which the Common Law has its roots. It is a consoling thought in these days that, in spite of the injuries which the Common Law has sustained at the hands of modern Parliaments, its worthy traditions are still preserved inviolate in the minds and hearts of lawyers like Mr. O'Sullivan.

In his first lecture Mr. O'Sullivan shows how the Common Law concept of the *liber et legalis homo* as the ordinary man of the law developed out of the Christian idea of the equality of human nature. The normal person in the eyes of the Common Law is free and law-abiding, reasonable and morally responsible. He has these characteristics simply because he is a human being. Another aspect of this concept of man is expressed in the principle that all men are subject to the moral law and the law of the realm, and therefore omnipotence could not be attributed to any human being or any human institution. There was accordingly a limit even to what Parliament could do. Mr. O'Sullivan shows how it is only since the development of the principle of the omnipotence of Parliament in the latter half of the seventeenth century that serious encroachments have been made on the freedom and independence of the individual. Successive Parliaments have continued to undermine the status of the individual and in our own day we see the free and lawful man being replaced by the " statutory man ", a creature of impaired intelligence who " needs for the perfection of his mind and will the light of the anonymous gentleman in Whitehall which lighteth Everyman that cometh into the realm ". The degradation of the individual is surely almost complete.

Mr. O'Sullivan's first lecture is perhaps the most important and certainly provides the key to his views on the matters dealt with in the others. All four lectures, however, deserve to be widely read and closely studied. Mr. O'Sullivan shows us how the law must retrace its steps if civilisation is to be preserved. He gives us the Christian solution. The family must be rebuilt on firm foundations and must be recognised as the true unit of society. Marriage which has steadily assumed " the characteristics of a contract for a tenancy at will" must once more become a sacrament. Mr. O'Sullivan is too profoundly a Christian to be a pessimist—"the ordinary man of the law . . . may yet be the hope of the world". Let us hope that the ordinary man still has sufficient vigour to shake off the chains by which he is bound.

Lindley on Partnership—A Treatise on the Law of Partnership. By the late the Rt. Hon. Lord Lindley. Eleventh Edition. By Henry Salt, K.C., and Hugh E. Francis. Foreword by the late Lord Uthwatt. 1950. London : Sweet and Maxwell, Ltd. Price £6 6s. net.

Ninety years have elapsed since Nathaniel Lindley first published his Treatise on the Law of Partnership, including its application to companies. In due course the part on companies broke away with the independent development of that branch of the law. Thirty years later, when the book had already become an authority, Pollock's Partnership Act substantially codified the existing law on the subject and since then the book has developed, like the law on the topic, round the Act. It is now fifteen years since the tenth edition but in that period the Legislature and the Courts have effected few material changes in the law. The developments have been less spectacular than in some other fields of law and the present editors have been enabled thereby to bring *Lindley* up to date without increasing its bulk or drastically altering the learned author's *ipsissima verba.* On occasions, however, this policy reveals traces of what is now a matter of academic antiquity, such as references to practice prior to the Judicature Act of 1875.

The fact that the legislation on the subject is substantially applicable to Scotland as much as to England makes *Lindley* the authoritative modern work in Scotland as well as in England, but the book has never professed to deal with Scots law. Hence, though some Scottish cases are cited, one looks in vain for the recent Scottish decisions, such as *Fife County Council* v. *Minister of National Insurance*, 1947 S.C. 629; and the interesting *Mair* v. *Wood*, 1948 S.C. 83. The Scot must then be prepared to search his own Digest and authorities in supplement to *Lindley.* The English decisions since the last edition have been carefully incorporated. The provisions in the National Health Service Acts relative to Medical Partnerships have been printed in an appendix. It is unfortunate that there are as yet no decisions on this topic on which the learned editors could found a commentary. The whole revision has been effected with skill and accuracy and should enable this invaluable and classic authority to complete its first century of existence in as high regard as hitherto.

Cases on Private International Law. Second edition. By J. H. C. Morris, D.C.L. Oxford : at the Clarendon Press. Price 30s. net.

This students' case-book is intended primarily as a companion to Cheshire's *Private International Law*, but it will also be useful to students using other textbooks. There is a good selection of cases—and not too many.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

The History of Capital Punishment : Including an Examination of the Case for and against the Death Penalty. By George Ryley Scott. Illustrated. 1951. London : Torchstream Books. Price 21s. net.

Brighouse's Short Forms of Wills. Sixth Edition. By Edward F. George, LL.B., and James H. George, LL.B. 1951. London : Sweet & Maxwell, Ltd. Price 15s. net.

Nationality of Married Women : Report submitted by the Secretary-General of the United Nations. 1951. A United Nations Publication. Price 3s. 9d. net.

Lord Atkin of Aberdovey, 1867–1944. Reprinted from the Proceedings of the British Academy, Vol. XXXII. 1951. London: Geoffrey Cumberlege. Price 2s. 6d.

County Court Manual. Second Edition. By R. C. L. Gregory, LL.B., Barrister-at-Law. 1951. London: H. M. Stationery Office. Price 6s. net.

Addington, The Author of the Modern Income Tax. By A. Farnsworth, LL.B., Ph.D. 1951. London : Stevens & Sons, Ltd. Price 21s. net.

Classical Roman Law. By Fritz Schulz. 1951. Oxford : at the Clarendon Press. Price 42s. net.

The Pocket Law Lexicon. Eighth Edition. By A. W. Motion, M.A., LL.B., of the Inner Temple, Barrister-at-Law. 1951. London: Stevens & Sons, Ltd. Price 17s. 6d. net.

Every Man's Own Lawyer. Sixty-seventh Edition. By A Barrister. 1951. London : The Technical Press, Ltd. Price 30s. net.

The Organisation of State Administration in Delaware. By Paul Dolan. The Johns Hopkins University Studies in Historical and Political Science, Series 68, No. 1. 1951. Baltimore : The Johns Hopkins Press.

Statement of Legal Concepts of Accounting. By George S. Hills. 1951. Reprinted from *Iowa Law Review.*

A Practical Epitome of the Death Duties. By David Harrison, LL.D., Consulting Editor for Scots Law, R. A. Green, B.L. Second Edition. 1951. London: Sweet & Maxwell, Ltd. Edinburgh: W. Green & Son, Ltd. Price 37s. 6d. net.

Copyright and Industrial Designs. By A. D. Russell-Clarke, Barrister-at-Law. 1951. London : Sweet & Maxwell, Ltd. Price 37s. 6d. net.

Factory Law. Fifth Edition. By H. Samuels, M.A., Barrister-at-Law. 1951. London : Stevens & Sons, Ltd. Price £3 3s. net.

Hume: Theory of Politics. Edited by Frederick Watkins, Bronfman Professor of Political Science, M'Gill University. 1951. Edinburgh : Thomas Nelson & Sons, Ltd. Price 7s. 6d. net.

Probation and Related Measures. A United Nations Publication. 1951. New York : United Nations Department of Social Affairs. [Available from H. M. Stationery Office.] Price 22s. 6d. net.

The International Law of Recognition. With special reference to practice in Great Britain and the United States. By T. C. Chen, D.Phil.(Oxon.). Edited by L. C. Green, LL.B. With a Foreword by Professor J. L. Brierly. Published under the auspices of The London Institute of World Affairs. 1951. London : Stevens & Sons, Ltd. Price £4 4s. net.

Recent Trends in the Law of the United Nations. By Hans Kelsen. Being a Supplement to *The Law of The United Nations.* Published under the auspices of The London Institute of World Affairs. 1951. London: Stevens & Sons, Ltd. Price 10s. 6d. net.

Trade Marks and the Law of Unfair Competition. Second Edition. By T. A. Blanco White, Barrister-at-Law. "This Is The Law" Series. 1951. London: Stevens & Sons, Ltd. Price 5s. net.

Higgins and Colombos on the International Law of the Sea. Second Revised Edition. By C. John Colombos, K.C., LL.D. 1951. London : Longmans, Green & Co., Ltd. Price 50s. net.

JURIDICAL REVIEW

THE SCOTS LAW REGARDING ACTIONS OF REPARATION BASED ON FALSE STATEMENTS.

OUR textbooks offer little hope of redress to one who has suffered loss as a result of a false (but not fraudulent) representation. The main authority, Glegg, declares categorically that no remedy is available,[1] but the value of this statement is vastly diminished by Glegg's failure to explain the greater part of the important cases hereinafter discussed, many of which he does not even mention.

Bell[2] is not so downright as Glegg. He chiefly covers the matter under "Obligations and Contracts". So we find[3] ". . . In certain cases, one who has induced another in bad faith or negligently to act upon an informal or legally incomplete agreement,[4] which cannot be enforced by specific implement, has been held bound to recoup specific loss or expenditure so incurred"; but he adds in a note "it may be doubted whether these ought not to be regarded as cases of contract perfected by *rei interventus*". Again, in a note to section 73, Bell comments "Possibly in some cases special damage arising from the revocation [of an offer] may be given even where there has not been acceptance; see

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[1] "Honest representations inducing a person to act in a particular way may be careless, inaccurate, and misleading, but, unless the relationship of trust exists between the parties, the person so induced to act has no remedy"—Glegg, *The Law of Reparation in Scotland*, 3rd ed. (1939), revised by J. L. Duncan, p. 227. This sentence does not appear in earlier editions and is taken from *Robinson* v. *National Bank of Scotland*, 1916 S.C. 46; 1916 S.C. (H.L.) 154; *post*, p. 214.

[2] Bell, *Principles of the Law of Scotland*, 10th ed. (1899).

[3] In s. 29.

[4] The meaning of this will appear later.

Walker v. *Milne*[5] and *Allan* v. *Gilchrist* ".[6] These cases are later discussed in detail, but it is convenient to point out at this stage that in *Walker* there was, as will appear,[7] no question of an offer, nor was there any sort of agreement to be made a contract by *rei interventus*.

Finally, under " Reparation " we find in a note " There is a class of cases which perhaps ought to be referred to the head of quasi-delicts [negligence as opposed to fraud[8]] rather than either to that of recompense[9] or damages for breach of contract : *viz.*, those in which one who has by representations or conduct induced another to incur expense or loss in reliance upon an informal or incomplete agreement, and has fraudulently or in bad faith refused to bind himself so as to be liable in specific implement, has been held liable to make good specific expenditure so caused ".

There are two difficulties about this passage. First, it is self-contradictory : it starts by reference to cases based on quasi-delicts, but goes on to explain them as cases of fraud, *i.e.*, as delicts, not quasi-delicts. Second, it limits the action to cases where there has been some sort of " agreement "—though not such as to be enforceable as a contract. This edition of *Bell* was published before a number of important cases which will be referred to later.

Gloag, as is to be expected, deals with the question as if it were one of contract. He considers two situations[10]—

(i) A party has incurred expense in negotiations in the hope of a contract, though no " actual agreement " has been reached. Here his hesitant view is that the claim will fail.

(ii) A party has acted in reliance on an " actual agreement " though not one constituted in the form required by law. By "actual agreement" Gloag seems to mean that the parties are agreed on all the terms necessary to constitute a contract, but it remains informal in that they have not made or evidenced that agreement in the form which the law requires. In this second situation Gloag's view is that—

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[5] 1823, 2 S. 338.

[6] 1875, 2 R. 587.

[7] *Post*, p. 202.

[8] See Gloag and Henderson, *Introduction to the Law of Scotland*, 4th ed. (1946), at p. 374.

[9] The quasi-contractual obligation under which in certain circumstances a person who has been enriched by the lawful act of another may be bound to recompense or idemnify that other to the extent of his gain. See *Gloag on Contract*, 2nd ed. (1929), Ch. XVIII.

[10] P. 176 *et seq.*

(1) If there is fraud general damages can be claimed as well as specific.

(2) If there is gain to the defender, a claim may be made on the principle of recompense.

(3) If there is no fraud and no gain "there is a good deal of authority" for the contention that the party making the representation "is bound to meet the expenditure"—but not the general damages—of the other party. This view Gloag bases on *Walker* v. *Milne*[11] and the series of cases referring thereto (later discussed), and remarks of the last of that series[12] that in it "the authority of *Walker* v. *Milne*, and consequently the relevancy of a claim for reimbursement of *definite expenditure in reliance on an agreement inadequately vouched*[13] would appear to be recognized".

So much for our writers; let us now turn to the cases. There are seventeen of importance, and they will be taken in chronological order.

1. The first and foundation is the famous Melville Monument case, *Walker* v. *Milne & Others*.[14] The pursuer averred that the defenders had entered into a contract with him to erect the Melville Monument (which now stands in St. Andrew Square, Edinburgh) on the pursuer's estate of Coates, near Edinburgh. He further averred that for their

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[11] 1823, 2 S. 338.

[12] *Gray* v. *Johnston*, 1928 S.C. 659; *post*, p. 215.

[13] The italics are the writer's.

[14] 1823, 2 S. 338.

purpose the defenders had entered on the site and broken it up; and that he had been thus induced to make various alterations to his plans for feuing his estate, and to the drains and levels, all involving him in expenditure which he would not have incurred but for the alleged contract. He claimed specific implement of the contract—this claim he abandoned in the Outer House in view of the erection of the Monument elsewhere—or at least damages. Neither the nature nor the amount of the claim of damages appears from the report. The defence was that though there had been communings no contract had been completed, and that even if there had been an agreement, yet, as it related to heritage and was not in writing, it did not constitute a binding contract.[15]

The Lord Ordinary found that the transaction related to heritable property, and was not obligatory not having been reduced to writing; that there was no contract and that the writings were " not only altogether insufficient to afford evidence of any contract binding on the parties . . . but even establish, that when the negotiations broke off, they were only *in nudis finibus contractus* without having advanced so far as to have agreed upon the general terms of the conveyance, the extent of the property to be acquired, or the conditions upon which it should be held, or even the person in whom the feudal title to the property should be vested " and accordingly dismissed the case.

The pursuer appealed, and the Inner House " agreed . . . that no effectual contract had been concluded ", but found that " the pursuer is entitled to indemnification for any *actual*[16] loss or damage he may have sustained and for the expenses incurred in consequence of the alteration of the site of the monument ". After certain subsequent procedure the case was remitted to a jury for the assessment of the damages.[17] As Lord Deas pointed out in *Allan* v. *Gilchrist*[18] the relevancy of the items of the alleged loss does not appear ever to have been settled, nor the case brought to any judicial conclusion. It may be explained, however, that the defenders had from the first offered to restore everything, at their own expense, to the state in which it originally stood. Presumably this offer would be renewed (if, indeed, it was ever withdrawn) after the pursuer was found entitled to indemnification. On this basis the points still at issue between the parties would be (i) the cost of alterations on the plans; (ii) the expenditure on the drains and levels; and (iii) general damages. It seems hard to conceive that the defenders would not concede (i) and (ii), and not, therefore, unreasonable to assume that (iii) was the question to be decided by the jury.

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[15] As a generality Scots Law requires contracts relating to heritage to be constituted by probative writing.

[16] The italics are the writer's. As will appear later the use of this word is important in view of its subsequent narrow interpretation.

Thus what was recognized in the case was not a claim of damages for breach of contract, but a claim for reimbursement of substantial loss occasioned to the one party by the representations and inducements recklessly and unwarrantably held out to him by the other.[19] In other words, it was an action in reparation. It was so regarded by the contemporary reporter, whose rubric starts "Reparation": and almost certainly it would not have been sent for trial by jury had the claim been treated as contractual.[20] Nevertheless our writers have insisted on regarding it as a contract case. So we find it discussed fully by Gloag,[21] but it is not even mentioned by Glegg[22] though Bell[23] refers to it as possibly a case of reparation. Be it noted that in the case there was no contract, nor "actual agreement" in Gloag's sense[24]; no enrichment of the defenders; and no averment of fraud.

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[17] 1824, 3 S. 82; 1825, 3 S. 333.
[18] 1875, 2 R. 587, 590.
[19] See Lord Deas in *Allan* v. *Gilchrist* at p. 590.
[20] See Jury Trials (Scotland) Act, 1819, 59 Geo. III., c. 35.
[21] *Gloag on Contract*, 2nd ed. (1929).
[22] Glegg, *The Law of Reparation in Scotland*, 3rd ed. (1939), revised by J. L. Duncan.
[23] *Ante*, p. 200.
[24] *Ante*, p. 200.

2. *Oliver* v. *Suttie.*[25] A sheep farm was advertised to let as extending to a certain acreage. A lease was granted to the pursuers, and some years later it emerged that the acreage was overstated in the advertisement by nearly 25 per cent. The tenants brought an action to have the lease reduced and for damages. The Court held that there was no ground of action in the absence of an averment of fraud. In reaching this decision the Court was influenced by the fact that the pursuers wanted to be quit of their lease, being in arrears with their rent; that a reasonably prudent intending tenant might have been expected to satisfy himself of the extent and capacity of a farm of which he proposes to become a tenant[26]; and that the pursuers were at least not under any misapprehension at the time as to the quantity of stock the farm could carry. *Walker* v. *Milne*[27] was not mentioned.

3. *Campbell* v. *Boswall.*[28] A mining engineer having reported to the owner of certain lands that they contained seams of coal of a specified thickness, the owner advertised them to let, with reference to the report, but without any warranty of its accuracy. A lease was made, and later it turned out that there was no workable coal. The tenants claimed £5,000 "in reparation of their outlay, cost, expenses and damages". The record having been made up, an issue was prepared by the jury clerks ". . . Whether, by false representation, the defender . . . induced the pursuer to enter into the lease . . . and to expend large sums of money preparatory to working coal . . . to the loss, injury and damage of the pursuer?". The defender objected to this proposed issue on the ground that the pursuer must prove fraud, not mere false representation, and on this point the case came to the Inner House, who held that in the special circumstances of the case (the defender having employed a person of skill to report, and the pursuers having themselves examined the land) the false

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[25] 1840, 2 D. 514.

[26] A sort of personal bar or estoppel.

[27] 1823, 2 S. 338.

[28] 1841, 3 D. 639.

representation on the part of the landlord did not, in the absence of fraud, render him liable for the loss suffered by the tenants.

Nevertheless it appears from the Opinions that even without fraud an action might have been competent if there had been negligence (misleadingly and, as is now well established, erroneously, termed " gross " negligence, or "*culpa lata*"). Thus Lord Gillies sees[29] ". . . no reason why [the defender] should be made liable for the error. . . . It would be very dangerous . . . to send the case to the Jury on an issue, under which they might find [the defender] liable in damages, on a mere proof that the representations were erroneous. *Either gross negligence or fraud*[30] must be proved . . .".

Again, Lord Mackenzie says[31] ". . . The question here is, whether the issue should contain fraud? *There is no averment of culpa lata.*[30]. . . If the fact had been, that the pursuer had relied entirely on [defender's] statement without any personal inspection, the case would have been different, and I do not know that the case of *Oliver*[32] would have carried the defender through . . .". Lord Mackenzie contemplated, therefore, the possibility of an action based on negligence, or even in the absence of negligence, had not the inspection on the part of the pursuer operated a kind of personal bar, not perhaps in essence different from that previously mentioned in discussion of *Oliver* v. *Suttie.*[33]

The Court ordered the insertion of the word " fraudulent " in the issue. There was no reference to *Walker* v. *Milne.*[34]

4. *Bell* v. *Bell.*[35] The pursuer claimed from the defender reimbursement of money expended by the pursuer in the erection of a house on land belonging to the defender, with his knowledge and on the faith of his verbal promise to convey the land to the pursuer. The action was brought

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[29] At p. 644.

[30] The italics are the writer's.

[31] At p. 645.

[32] *Oliver* v. *Suttie*, 1840, 2 D. 514; *ante*, p. 204.

[33] *Ante*, p. 204.

[34] 1823, 2 S. 338.

[35] 1841, 3 D. 1201.

after the defender had conveyed the land to a third party. The main defence was that in the absence of writing there was no binding contract.

In the Outer House the Lord Ordinary remitted the cause to the jury clerks, reserving all questions of relevancy. Issues were framed and the matter was appealed to the Inner House by way of objections to the proposed issue. The Inner House (of four Judges) approved the issue "... Whether ... the defender promised and agreed to convey to the pursuer a piece of ground ... and whether ... on the faith of the said promise, the pursuer erected a house on the said ground and expended on the same the sum of £270, or part thereof? ... Whether the defender homologated or acquiesced in the said expenditure by the pursuer ... ?"

The ground of approval of two of the four Judges was that the defender's promise was fraudulent and that what the pursuer claimed was reparation for the loss sustained through that fraud. The third approved on the ground that the damages claimed were not the substitute or equivalent for implement (no action could, of course, have been brought on the "contract" as it was improbative), but merely the amount of the actual loss or expense which he had been led into by the defender's promise, saying that the claim was precisely the same as that made in *Walker* v. *Milne*.[36] The Lord President concurred, but from the report it is not clear with whom.

It is notable that the pursuer does not appear to have founded on or referred to *Walker*, that case being first mentioned by one of the Judges of the Inner House.[37] An "actual agreement"[38] was averred. The Court found fraud though there was no specific averment of it, and as has been seen it does not appear in the issue as approved. *Bell* again is clearly a case of reparation. The rubric starts "Proof—recompense—reparation", and two of the Judges make it clear that they so regarded it.[39] Gloag[40] suggests that the defender might have been liable apart from fraud on the principle of recompense, in view of the enrichment of the defender, but only, of course, to the extent of that enrichment.

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[36] 1823, 2 S. 338.

[37] Lord Fullerton, at p. 1204.

[38] *Ante*, p. 200.

5. *Heddle* v. *Baikie*.[41] The complicated story behind this case does not appear from the report but can be found in a summarized form in Lord Deas' Opinion in *Allan* v. *Gilchrist*.[42] The defender had ceded to the pursuer possession of a farm without any formal lease or agreement. The pursuer was allowed to keep possession for more than six years, during which time he had spent money on improvements. He was then ejected under a decree and warrants which, ten years after the ejection, were set aside as wrongous and illegal. Thereupon he brought the present action in which he claimed (i) for damages and *solatium*, £1,000; (ii) for meliorations, £380; and (iii) the expenses he had incurred in the earlier proceedings. His proposed issue ran "1. Whether upon an agreement made with the defender, the pursuer entered as tenant into the lands and farm . . . ? And whether it was understood and agreed between the pursuer and the defender, that the defender was to grant to the pursuer a lease . . . for nineteen years . . . ? And whether the defender wrongfully failed to grant such lease, to the loss, injury and damage of the pursuer? 2. Whether the defender induced the pursuer to enter into the possession and management of the said farm and to execute certain meliorations and repairs, and to expend various sums thereon . . . and whether the defender is indebted . . . to the pursuer . . . [in] the amount of the said meliorations and expenditure?

SCHEDULE

"1. Damages and *solatium*, £1,000.

"2. Account for meliorations, repairs and improvements, £380 . . .".

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[39] Lord Mackenzie and Lord Fullerton.

[40] At p. 177.

[41] 1846, 8 D. 376.

[42] 1875, 2 R. 587, 590.

In a proposed third issue the pursuer claimed the expenses of the earlier litigation. The Court disallowed this third issue but approved the other two, as follows: "The Court repelled the objections to the two first issues; and further found that [the claim in the third issue] could not be included in or stated to the jury as any part of the pursuer's alleged loss, injury and damage, and disallowed the said claim, either separately *or as part of the £1,000 specially concluded for*".[43] To the writer this is beyond doubt a claim for general damages, and he finds the greatest difficulty in following the statements constantly made later that in these actions based on representations the Court never allowed general damages, as distinguished from reimbursement of actual and specific loss, for which proposition this case is cited as authority. No reference was made to *Walker* or to *Bell*. There was an "actual agreement",[44] but improbative. There was enrichment of the defender, though not necessarily to the full amount of the claim for meliorations. There was no averment or finding of fraud, though Gloag[45] seems to take the view that it was present. 6. *Gowan's Trustees* v. *Carstairs*.[46] The pursuers averred a verbal (improbative) bargain to grant a lease, validated by *rei interventus*, homologation and acquiescence, and brought an action for specific implement but not for damages. In other words they sued *on the contract*.[47] The Court refused to allow proof without writing, the Lord Ordinary remarking (*obiter*)[48] that ". . . a very different question would arise if the pursuers were suing for reimbursement of outlay on meliorations . . . and the distinction . . . is clearly brought out [in *Walker* and *Bell*]. In both of these cases the rule was acknowledged and enforced that a contract as to land rights cannot be proved by parole, and yet in both of these cases the right to reparation was recognized as the appropriate equitable remedy". The suggestion that a claim on the *Walker* basis lies only where there has been expenditure on meliorations is wrong: there was no question of melioration in *Walker*.

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[43] The italics are the writer's.

[44] *Ante*, p. 200.

[45] At p. 177.

[46] 1862, 24 D. 1382.

[47] The italics are the writer's.

[48] At p. 1384.

7. A rather similar case,[49] where the action was again brought on contract, but for damages and not implement, failed for the same reason.

8. *Dobie* v. *Lauder's Trustees*.[50] Here the pursuer averred that the defenders had arranged to board some children with her for a term of years, and that she had incurred expenditure referable to that period, which was lost when the arrangement was suddenly terminated by the defenders. In the Outer House the Lord Ordinary treated the case as one of concluded agreement which could not be proved *in an action for implement of or damages for breach of the contract*,[51] but opined[52] that it fell within the rule of *Walker* and *Bell* "that parole evidence of the arrangements and actings of the parties is competent when the claim made is for relief or indemnity from *actual*[51] loss sustained by a party acting in reliance on the fulfilment by another, who has refused to carry out his part, of an arrangement which has been entered into, but which could only be made legally binding so as to be capable of enforcement on being committed to writing".

The defenders appealed on the ground that parole evidence was incompetent, and the Inner House, taking the view that there was no concluded agreement,[53] had no doubt that on principle and authority a claim for an indemnity lay, because "the arrangement necessarily included the condition that if the arrangement was terminated it should not be to the loss of one party . . .". Gloag[54] finds it hard to understand the distinction between an "arrangement" and a contract; the writer suggests that it means precisely the same as Gloag's "actual agreement".[55]

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[49] *Fowlie* v. *McLean*, 1868, 6 M. 254.

[50] 1873, 11 M. 749.

[51] The italics are the writer's.

[52] At p. 753.

[53] "I think the claim can only be supported on the footing that there was no concluded or binding contract. . . . It was a family arrangement . . ." (L.J.C. Moncreiff at p. 754. Lords Cowan and Benholme concurred).

[54] At p. 19.

[55] *Ante*, p. 200.

Lord Neaves[56] thought that the principle applicable to the case was that when parties are engaged in promoting an object of common interest, and the expenses entailed are thrown on one of the parties, then when that expenditure fails of obtaining the end aimed at the party-disburser must be recompensed as being the disburser for a common object. Of this Lord Ardwall says in *Gilchrist* v. *Whyte*[57] that it may with equal truth be said that this was an action founded upon a wrong which consisted in the defenders leading the pursuer by certain representations to incur serious outlay and then disappointing her expectations without any reason. In *Dobie* then there was an "actual agreement"[58] but improbative. There was neither fraud nor enrichment of the defender.

9. *Allan* v. *Gilchrist*.[59] This was an action brought by a father and son for damages for breach of a contract of sale. They averred that the defender had agreed verbally to buy a shop and the stock-in-trade and goodwill of the business, and that following on this the father pursuer—a baker—had dismissed his apprentices and arranged to retire, and that they had suffered loss when the defender refused to implement the contract. It was held (i) that the agreement was for the sale of heritage, so could not be proved by parole; (ii) that there were no relevant averments of *actual*[60] expenditure in reliance on the agreement. The action therefore failed.

The Court took the line that no action would lie for general damage as distinct from incurred expenditure (this is the first and leading case on this aspect) Lord Deas saying[61] ". . . We have no instance of [such a] claim being entertained for general damage as distinct from *actual*[60] and specific loss, which is what the claim embodied in the first issue in *Heddle* involved". As the writer has tried to shew[62] this statement is not borne out by the decision in

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[56] At p. 755.

[57] 1907, S.C. 984, 993. *Post*, p. 213.

[58] *Ante*, p. 200.

[59] 1875, 2 R. 587.

[60] The italics are the writer's.

[61] At p. 592.

[62] *Ante*, p. 208.

Heddle v. *Baikie.*[63] *Heddle*, however, does seem to be the only one in which we find clearly and specifically a claim for general damage, though, as the writer has suggested,[64] the finding of the Inner House in *Walker* that the pursuer was entitled " to indemnification for any actual loss or damage he may have sustained and for the expenses incurred " is amply wide enough to cover a claim of general damages. Indeed the words " to . . . sustained " have little meaning otherwise, seeing that expenditure is covered by the later words.

Furthermore in *Allan* v. *Gilchrist* the Court took occasion to doubt the general application of the decisions in *Walker* and *Heddle*, Lord Ardmillan saying ". . . The case of *Walker* was very special and . . . nothing but the very special and exceptional circumstances of that case can support the judgment. It is on its facts so peculiar that it is not a safe authority where the circumstances are different ".

10. *Lees* v. *Tod.*[65] Directors of a company submitted to the annual general meeting of shareholders, and advertised to the public, reports and balance sheets which contained grave misstatements. They had been certified correct by the company's auditor. A shareholder brought an action of damages against the directors on the ground that he had been induced to buy his shares through their false and fraudulent representations in the published reports and balance sheets.

The Inner House held that there was no fraud, and the action failed. An observation of interest to our purpose was made by Lord Deas[66] " . . . There is no attempt in the pursuer's condescendence to state a case of negligence or neglect of duty of any description. It is therefore unnecessary to consider whether a gross case of that kind might or might not have been so stated as relevant to infer pecuniary conclusions . . .". Lord Deas at the very least was not prepared to rule out an action on negligence had it been averred and proved.

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[63] 1846, 8 D. 376.

[64] *Ante*, p. 203.

[65] 1882, 9 R. 807.

[66] At p. 833.

11. *Hamilton* v. *Lochrane.*[67] The pursuer averred he had made alterations to a villa in reliance on a verbal (improbative) agreement to buy it. The Inner House (*dub.* Lord Moncreiff) allowed the pursuer a proof before answer *prout de jure.*[68] Gloag[69] refers to it as "this very doubtful case, where proof in a claim for *recompense*[70] was allowed although there were no averments that the defender was *lucratus*". This comment is misleading, the proof allowed was of reimbursement, not of recompense.

Lord Moncreiff hesitated because ". . . The present case is weaker [than *Walker* or *Bell*] inasmuch as the defender entirely denies that the work was done at her risk and she was not *lucrata* by it to any extent".[71] (The defender had admitted that the pursuer made alterations or additions because of her objections, the question being at whose expense.) He goes on to reserve his opinion where there are no such admissions. ". . . It may be that the same principle would apply, but the authorities relied on do not seem to me to be conclusive. In *Walker* v. *Milne* the purchaser actually entered on and broke up the intending seller's ground. [It was much the same in *Bell* v. *Bell.*] In neither case was there any nice disputed question of contract or inducement to go to proof. There is no authority for the proposition that in every case in which a pursuer who claims damages for breach of contract relating to heritage is unable to instruct the contract by writ or oath he is entitled to prove by parole the very same averments for the purpose of obtaining, it may be, the same items of claim under the name of reimbursement or recompense for outlays made or work done on the faith of the alleged contract". The answer is, of course, that as has been made clear in earlier cases,[72] the pursuer in such cases bases his claim on wrong, not on contract. In *Gilchrist* v. *Whyte*[73]

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[67] 1899, 1 F. 478.

[68] *I.e.*, parole proof.

[69] At p. 321.

[70] The italics are the writer's.

[71] This is misleading; the defender was not enriched in *Walker*.

[72] See Lord Deas' Opinion in *Allan* v. *Gilchrist*, 1875, 2 R. 587.

[73] 1907, S.C. 984.

Lord Ardwall shares Lord Moncreiff's doubts of the decision in *Hamilton*.

12. *Gilchrist* v. *Whyte*. Pursuer was negotiating with defender to make him a loan to be secured on the defender's heritable property. At a late stage in the negotiations, after the pursuer had incurred some expense in investigation of the title of the proposed security subjects, and had lost interest on money which he had kept on deposit with a view to the loan, but before there was any actual agreement, the defender withdrew from the bargain. The pursuer failed in a claim for his losses, the Inner House holding that *inter alia* the alleged representation was only an expression of intention.

Lord Ardwall[74] thought that from *Allen*, *Walker*, *Heddle*, *Bell*, *Dobie* and *Hamilton* "it may be inferred that an action of damages founded on the ground of recompense[75] for loss caused through the failure to complete or carry out a contract, but where there has been no special breach of contract, will only be entertained by the Court in very special circumstances indeed, and for the most part only in cases where (i) loss has been wrongfully caused by one of the parties to the other, excluding, however, loss or expense incurred as part of the abortive negotiations between the parties; (ii) where the wrong has been done without any excuse; and (iii) where the losing party is in no way to blame for the loss". As Gloag points out[76] it is hard to reconcile this with the decision in *Dobie* v. *Lauder's Trustees*.[77] It is no less difficult to reconcile it with *Walker*.[78]

13. *Mackay* v. *Rodger*,[79] another case of fraud, in which *Bell* and *Allan* were followed, in that proof by parole evidence was allowed. There was no reference to *Walker*, and the case was one of expenditure following on an improbative agreement.

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[74] At p. 993.

[75] Apparently used in the sense of compensation.

[76] At p. 19.

[77] 1873, 11 M. 749; *ante*, p. 209.

[78] 1823, 2 S. 338; *ante*, p. 201.

[79] 1907, 15 S.L.T. 42.

14. *Boyd & Forrest* v. *Glasgow & S.W. Ry.*[80] A railway company invited tenders for the construction of a line, and represented to a firm of contractors that the rock to be excavated was of less hardness than was actually the case. The Inner House held that the representations were false and fraudulent as being so reckless as to be equivalent to fraud, though not intentional. The House of Lords reversed on the ground that there was no dishonesty and so no fraud. The only point taken in the Lords was that of fraud.

From the report of the proceedings in the Court of Session[81] it appears that the claim was based on recompense, on the footing that the contract fell to be disregarded, and the pursuer was quasi-contractually entitled to be repaid the enrichment of the defenders. Alternatively, the pursuers claimed that they had suffered loss and damage to the extent of the sum sued for " in respect of the fraud, negligence and breach of contract ". There is no reference to *Walker* nor *Bell.*

15. *Robinson* v. *National Bank of Scotland, Ltd.*[82] The pursuer averred that he had been induced by the fraudulent representations of the defenders to become cautioner (guarantor) for a loan. The House of Lords affirmed the judgment of the Court of Session, holding that the representations although careless, inaccurate and misleading were not dishonest and therefore not fraudulent. In view, however, of the serious prejudice suffered by the pursuer they deprived the defender of expenses in the House and in the Court of Session.

Obiter the Lords expressed the view that the law provided no remedy, all agreeing with Earl Loreburn when he said[83] " This is an action for false and fraudulent representation. In such an action the pursuer cannot succeed, unless he prove dishonesty. There is another kind of action known to the law, namely for some breach of duty arising out of the relations between the parties [*e.g.*, solicitor and client, but] . . . it is . . . quite a different proceeding, and has nothing to do with fraud. . . . It is impossible not to feel that though *the pursuer has no remedy in law*,[84] he has been ill-treated. I think it is hard upon him that he has not been recompensed . . .''. Their Lordships' attention was not drawn to the *Walker* series of cases, and this being so in the writer's submission their *dictum* may well be open to challenge.

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[80] 1912 S.C. (H.L.) 93.

[81] 1911 S.C. 33.

[82] 1916 S.C. 46; 1916 S.C. (H.L.) 154.

[83] At p. 155.

16. *Newton* v. *Newton*.[85] The pursuer, buyer of a house, had taken the title in favour of his intended wife. After his marriage proof of his averment that his wife held the house in trust for him was held to be limited to writ or oath. Parole evidence was, however, allowed in support of a separate claim that the pursuer had expended money on the improvement of the house in the mistaken belief that it was his own property [such proof being allowed in actions based on recompense] and he was found entitled to payment in so far as his wife was *lucrata* by the improvements. Here there were no representations and the award was of recompense in the quasi-contractual sense.

17. The last case is *Gray* v. *Johnston*.[86] The pursuer sued Johnston, who was executor of a farmer who had died intestate. He averred that the deceased had proposed to him that if he gave up a remunerative situation, and looked after the deceased (an invalid) the deceased would make him his heir; and that he did so and lived for sixteen years with the deceased without remuneration. He claimed either to be indemnified for his loss, which he estimated at £6,000, due to the failure of the deceased to make a will in his favour, or to be recompensed in so far as the estate had benefited by his services. The Inner House, by a majority of three to one, dismissed the action as irrelevant on the ground that (as regards the first ground of claim) the loss was based solely on hypothetical calculations and not on

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[84] The italics are the writer's.

[85] 1925 S.C. 715.

[86] 1928 S.C. 659.

actual[87] outlay, and (as regards the second ground of claim) there were no relevant averments to support a claim for recompense as distinguished from the other grounds of claim.

In the Outer House Lord Murray[88] had distinguished *Walker*, *Allan*, *Hamilton* and *Gilchrist* on the ground that in all those cases there was an alleged or admitted agreement or contract, which failed in respect that it was incapable of proof by our rules of law, or because there was a *locus pœnitentiæ*. This is incorrect as regards both *Walker* and *Gilchrist*, in neither of which cases had the parties passed from negotiation to agreement.[89] Another distinction made by Lord Murray was that in each of the four cases the claim was for indemnification for outlays, and there was no claim for general damages. This is probably untrue of *Walker*.[90] Pointing out that in such cases the question of enrichment does not arise, he added "Whatever be the principle which lies at the root of these cases, whether it be implied contract or mandate or the like . . . in view of the case of *Gilchrist* . . . the tendency is against any extension of their application".

In the Inner House, Lord Hunter, dismissing the claim, said[91] ". . . As I understand the pursuer's argument, he seeks to bring his case either under the category of cases where a claim for remuneration (*sic*—? reimbursement) has been entertained on the ground of outlay incurred on misrepresentation by the defender" or on the ground of recompense. "The argument proceeded upon the footing that there are two distinct categories, though they might probably be treated under one head. The typical case under the first of these categories is *Walker*". He adds that other leading cases are *Bell* and *Heddle*, and that *Gowans*, *Fowlie* and *Hamilton* all emphasize the restricted nature of such a claim. *Bell*, of course, is nowadays generally regarded as a case of reparation for fraud,[92] and the same may be true of *Heddle*.[93] As to *Gowans*, as has been pointed out, the pursuer failed because he sued in contract[93]; and the same is true of *Fowlie*.[94]

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[87] The italics are the writer's.

[88] At p. 664.

[89] As regards *Walker*, see *ante*, p. 202; as to *Gilchrist*, see Gloag, p. 19.

[90] *Ante*, p. 211 on the question of general damages.

[91] At p. 669.

Lord Ormidale[95] said of *Walker* that it " is an unfortunate foundation on which to base this principle or doctrine [that when, apart from concluded agreement loss has been occasioned to a party by actings or inducements unwarrantably held out by another, the aggrieved party is entitled to recover damages] for it is impossible from the reports of the case, even with the assistance of the session papers, to learn precisely what the Court finally decided . . . I gather [from *Walker*, *Bell*, *Heddle* and *Allan*] that . . . a claim in equity is allowed apart from completed contract . . . only to be reimbursed for money actually expended, and that a claim for . . . general damage will not be entertained, and further, that the scope of the principle is not to be extended ". This, he adds, is confirmed by *Gowans*, *Fowlie*, *Hamilton* and *Dobie*. The writer's earlier comments cover these points.

Lord Anderson too was in favour of dismissing the case[96] on the basis that the *Walker* cases " sanction a relaxation of the rules of evidence [as to proof of contract] for a specific purpose that purpose being to restore the *status quo ante* by reimbursing the party who has sustained loss . . . that loss being limited to actual outlays and out-of-pocket expenses. . . . If it be asked why . . . the answer would seem to be that the law will not extend the exception to the effect of abrogating the rule. . . . But, whatever be the reason . . . there can, in my opinion, be no doubt that by plain implication, these decisions exclude a claim for general damages ".

The suggestion of relaxation of the rules of evidence is unsupported; and in any event Lord Anderson's foundation case lets him down, for it was one in which the Court found that there was no agreement to be proved by any kind of evidence.[97] Comment has been made already on the other point.

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[92] *Ante*, p. 206.

[93] *Ante*, p. 208.

[94] *Ante*, p. 209.

[95] At p. 671.

[96] At p. 673.

The dissenting Judge was the Lord Justice Clerk (Alness). On whatever principle *Walker* is based, he says, "it is vain to suggest that it is not firmly embedded in the law of Scotland ".[98] Dealing with the question whether any claim must be limited to actual expenditure he adds ". . . I cannot see why, as a matter of common sense and equity, if the pursuer had spent, say, £100 on the farm of the deceased, he should be entitled to get it back; but if he had wrecked his career, and served for sixteen years . . . in consequence of his representation, the pursuer should be disentitled from recovering a penny. It may well be that, in the cases which have actually arisen, expenditure was usually the basis of the claims made and allowed. That, I think, is a fortuitous circumstance. . . . Even if the pursuer's claim [were] for general damage . . . I know of nothing in law to exclude the claim apart from a *dictum* of Lord Deas in *Allan* . . .".[99]

Finally Lord Alness thought that the objections to the pursuer's claim in so far as based on reimbursement should fail. "Otherwise the pursuer, who on a definite promise surrendered a responsible situation and served the deceased during the last years of his life without remuneration—which he did not intend to—and who substantially enriched the deceased by reason of these services, would, the deceased having then neglected to fulfil his promise, be left entirely without redress. I decline to think that our law is so impotent as to countenance such a result, and indeed, if my view is wrong, to render it inevitable. If there ever was a case to which the doctrine of *Walker* v. *Milne* should apply, this, in my opinion, is that case ".

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[97] *Ante*, p. 202.

[98] At p. 676.

[99] " We have no instance of the claim being entertained for general damage "; *ante*, p. 210.

The writer respectfully agrees with the remarks of Lord Alness quoted in the last two paragraphs. He has tried to shew that in one of the cases—*Heddle*—constantly cited as authority for a limitation of claims to actual expenditure, and consequent denial of general damages, the facts do not warrant any such conclusion : and that the same is probably true of *Walker*.

It may be convenient to summarize the decisions in the seventeen cases which have been discussed.

(1) In four an action was allowed without any averment of fraud :—

- (i) *Walker* v. *Milne*.[1]
- (ii) *Heddle* v. *Baikie*.[2]
- (iii) *Dobie* v. *Lauder's Trustees*.[3]
- (iv) *Hamilton* v. *Lochrane*.[4]

(2) In two the action failed only because there was no proof of actual expenditure :

- (i) *Allan* v. *Gilchrist*.[5]
- (ii) *Gray* v. *Johnston*.[6]

(3) In two the action failed because fraud was not averred :

- (i) *Oliver* v. *Suttie*.[7]
- (ii) *Campbell* v. *Boswall*.[8]

(4) In three the action failed because it was based on fraud only, and fraud was not proved :

- (i) *Lees* v. *Tod*.[9]
- (ii) *Boyd & Forrest* v. *Glasgow & S.W. Ry.*[10]
- (iii) *Robinson* v. *National Bank of Scotland, Ltd.*[11]

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[1] 1823; *ante*, p. 201.
[2] 1846; *ante*, p. 207. Gloag suggests there was fraud.
[3] 1873; *ante*, p. 209.
[4] 1899; *ante*, p. 212.
[5] 1875; *ante*, p. 210.
[6] 1928; *ante*, p. 215.
[7] 1840; *ante*, p. 204.
[8] 1841; *ante*, p. 204.
[9] 1882; *ante*, p. 211.
[10] 1912; *ante*, p. 214.
[11] 1916; *ante*, p. 214.

(5) In two the action failed because based on contract which could not be proved :—

  (i) *Gowan's Trustees* v. *Carstairs.*[12]
  (ii) *Fowlie* v. *McLean.*[13]

Walker v. *Milne* might well have failed on this ground, but it seems that the Inner House of its own initiative treated the case as one of reparation. Cf. *Bell* v. *Bell*, where the Court allowed an action on the basis of fraud, though fraud was not averred.

(6) In two the action succeeded on fraud :

  (i) *Bell* v. *Bell.*[14]
  (ii) *Mackay* v. *Rodger.*[15]

(7) In one—*Gilchrist* v. *Whyte*[16]—the action failed because the representations were held to be no more than a statement of intention, so that the pursuer was not justified in acting on them.

(8) In one—*Newton* v. *Newton*[17]—the action succeeded on the basis of recompense.

In conclusion it is submitted that in Scots Law today—

(1) An action of reparation should lie for pecuniary damage caused by a negligently false representation.

(2) Both special and general damages should be claimable.

(3) Usually the effect of the representation will be to lead the claimant to believe that a contract either had or was to come into being, and to incur expenditure in such belief. In such cases as a general rule no action is competent unless at least "actual agreement"[18] was reached. So any loss suffered by the pursuer acting on a mere expression of intention, while matters are still in

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[12] 1862; *ante*, p. 208.
[13] 1868; *ante*, p. 209.
[14] 1841; *ante*, p. 205.
[15] 1907; *ante*, p. 213.
[16] 1907; *ante*, p. 213.
[17] 1925; *ante*, p. 215.
[18] *Ante*, p. 200.

negotiation, cannot be recovered. This, however, does not apply where there have been actings on the part of *both* parties on the faith of an intended agreement.[19]

(4) The pursuer may choose to sue in reparation even if he is entitled to sue in contract; but if he chooses to sue in contract and cannot prove that contract by the appropriate evidence he will fail altogether.

(5) Fraud is actionable always; general damages can probably be claimed.

(6) Where there is enrichment of the defender, the action may be based on recompense, but will, of course, be subject to any specialties of an action so based.

D. I. C. ASHTON-CROSS.

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[19] *Walker* v. *Milne*; *ante*, p. 201.

PRECEDENTS IN THE HOUSE OF LORDS

SINCE the decision of the House of Lords in 1898 in *London Street Tramways* v. *L.C.C.*[1] it has been a firmly established rule of English law that the House of Lords is absolutely bound by its own previous decisions, even where such a decision is patently erroneous in point of law; and that only where a previous decision was based on a mistake of fact, such as the oversight of a relevant statute,[2] may it be departed from.[3]

Lord Halsbury, in delivering the judgment of the House, described the rule as "established now for some centuries". It is not surprising to find that, in the absence of any constitutional provision laying down such a rule, the learned Judge should claim for it the exalted position of a long-standing, time-honoured usage accepted as part of the judicial tradition. However, this claim can hardly be said to be borne out by the facts, and a brief examination of some of the relevant pronouncements of the House of Lords during the years before the decision in *London Street Tramways* v. *L.C.C.* will reveal that the position was in fact doubtful, and in that year the rule as now established won the day chiefly as a result of the repeated assertions and narrow legalistic formalism of one Judge—Lord Campbell.[4]

In 1801 Lord Eldon seems to have thought that the House was not bound by its own decisions, for he said[5]: "A rule of law laid down by the House of Lords cannot be reversed by the Chancellor. . . . The rule of law must remain till altered by the House of Lords ".[6] In 1842 Lord Lyndhurst thought that the judgments of the House of Lords " are binding on all inferior jurisdictions, but not absolutely binding on this House ".[7]

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[1] [1898] A. C. 375.

[2] Lord Halsbury, at p. 180–1. It may be objected that oversight of a statute is hardly a mistake of fact at all, but rather a mistake of law. Thus, in the criminal law, where mistake of fact, unlike mistake of law, vitiates mens rea, it has been held that ignorance of an Act of Parliament does not afford an excuse to crime: *R.* v. *Bailey* (1800), Russ. & Ry. 1. See Kenny, *Outline of Criminal Law* (15th ed.), pp. 78–9.

[3] Previous decisions on foreign law, being regarded as matters of fact, are not binding: *Lazard Bros. & Co.* v. *Midland Bank, Ltd.*, [1933] A. C. 289.

[4] See Pollock, *First Book of Jurisprudence* (6th ed), p. 344 *et seq.*

[5] *Perry* v. *Whitehead*, 6 Ves. 544, 547.

In 1852, Lord St. Leonards, in *Bright* v. *Hutton*,[8] went so far as to attribute to all Courts of law an inherent power to correct their own errors. He said : " Although you are bound by your own decisions as much as any Court would be bound, so that you could not reverse your own decision in a particular case, yet you are not bound by any rule of law which you may lay down, if upon a subsequent occasion you should find reason to differ from that rule, *i.e.*, that this House, like every Court of justice, possesses an inherent power to correct an error into which it may have fallen ". Lord Campbell, in the same case,[9] took the opposite view. " According to the impression upon my mind ", he said, " a decision of this High Court, in point of law, is conclusive upon the House itself, as well as upon all inferior tribunals." But in 1854 Lord St. Leonards reiterated his opinion in no uncertain manner.[10] Lord Brougham in that case [11] thought the matter was a *questio vexata.* In 1860, however, Lord Campbell, having in the meantime become Chancellor, repeated his view in the most positive terms in *Att.-Gen.* v. *Dean and Canons of Windsor.*[12] Lord Kingsdown in this case [13] thought Lord Campbell's observations on this point were not necessary to the decision and reserved his opinion upon them.

A year later, in *Beamish* v. *Beamish* (1861),[14] Lord Campbell, though disapproving of the decision in *R.* v.

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[6] But in *Fletcher* v. *Sondes* (1827), 1 Bli. (N.S.) 144, 249, Lord Eldon used expressions to the contrary effect.

[7] *Brown* v. *Annandale*, 8 Cl. & Fin. 437, 453.

[8] 3 H.L.C. 341, 388.

[9] At p. 391.

[10] In *Wilson* v. *Wilson*, 5 H.L.C. 40, 63.

[11] At p. 71.

[12] 8 H.L.C. 369, 381, 391–93.

[13] At p. 459.

[14] 9 H.L.C. 274.

Millis[15] in which the decision appealed from was affirmed, or rather stood unreversed, by reason of the House of Lords being then equally divided, advised the House that it was bound by that decision. In *R.* v. *Millis* it had been held, in this not highly convincing manner, that by the old common law of England the presence of a priest was necessary to the civil validity of a marriage—an opinion which in 1861 was believed by a majority of the House of Lords, and is now believed by most authorities on the subject, to be without any historical foundation. But Lord Campbell declared himself not at liberty to act on his conviction. He said[16]:

> "Had the present case been brought here previously to the decision of this House in the year 1844, in the case of *R.* v. *Millis*, I should not have hesitated in advising your Lordships to affirm the judgement in favour of the Respondent. . . . The decision in *R.* v. *Millis* . . . seemed to me so unsatisfactory that I deemed it my duty to resort to the extraordinary proceeding of entering a protest against it in your Lordships' Journals. . . . I consider it most unjust and tyrannical.
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> "If it were competent to me, I would ask your Lordships to reconsider the doctrine laid down in *R.* v. *Millis*, particularly as the Judges who were then consulted complained of being hurried into giving an opinion without due time for deliberation, and the members of this House who heard the argument, and voted on the question 'That the judgement appealed against be reversed' were equally divided, so that the judgement which decided the marriage by a Presbyterian clergyman of a man and woman, who both belonged to his religious persuasion, who both believed that they were contracting lawful matrimony, who had lived together as husband and wife, and who had procreated children while so living together as husband and

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[15] (1844) 10 Cl. & Fin. 534.

[16] At pp. 334, 337, 338–39.

wife, to be a nullity, was only pronounced on the technical rule of your Lordships' House, that where, upon a division the numbers are equal, *semper præsumitur pro negante*. But it is my duty to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente*, and that the rule of law which your Lordships lay down as the ground of your judgement, sitting judicially, as the last and supreme Court of appeal for this Empire, must be taken for law till altered by an Act of Parliament, agreed to by the Commons and the Crown, as well as by your Lordships ".

The House, accordingly, held itself bound by *R.* v. *Millis*. Pollock's remarks on this case may be considered apt : " It may seem startling that questions of legitimacy and property should be treated as irrevocably settled by the result of an equal division of the House of Lords, on argument and information admittedly imperfect with regard to the history of the law ; that result, moreover, depending on the accident of the form in which the appeal was presented—but so they were ".[17]

It was only henceforward that judicial opinion seems to have settled in favour of the rule. In later years Lord Wensleydale spoke of the decisions of the House as " no doubt binding upon your Lordships and all inferior tribunals ".[18] and Lord Blackburn said : " When it appears that a case clearly falls within the *ratio decidendi* of the House of Lords, the highest Court of appeal, I do not think it competent for even this House to say that the *ratio decidendi* was wrong ".[19] Lord Halsbury spoke of the House as " a tribunal from which there is no appeal and which is bound by its own decisions ".[20]

At last, in 1898, in *London Street Tramways* v. *L.C.C.*, in which the only question argued was as to the power of the House to reconsider previous decisions of its own, the House positively held that it had no such power, but, as is now apparent, in doing so it certainly did not apply a rule " established now for some centuries ", but rather one widely contested during the same century, and established mainly as the result of an opinion tendered in repeated cases by a single Judge.

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[17] *Op. cit.*, p. 339.

[18] *Mersey Docks Trustees* v. *Gibbs* (1866), 11 H.L.C. 686.

[19] *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, 335.

[20] *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App.Cas. 127, 134.

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We shall now turn to the various arguments that have been advanced from time to time by the advocates of the rule.

Lord Campbell's own argument would seem to rest on the doctrine of Separation of Powers. In his judgment in *Beamish* v. *Beamish* he says [21] : " The law laid down as your *ratio decidendi*, being clearly binding on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own authority ". Thus, the justification of the rule is based not on any consideration of justice or public welfare, but on what Lord Wright has rightly branded " constitutional logic ".[22] Constitutional logic and elegance are certainly not considerations lightly to be disregarded, but, on the other hand, they may be bought at too high a price. In the present writer's view a situation such as was brought about by the decision in *Beamish* v. *Beamish* is much too high a price. The position is sufficiently unfortunate in the Court of Appeal, which, following the rule in *Young* v. *Bristol Aeroplane Co., Ltd.*[23] is also bound by its own decisions. There, Judges again and again protest their whole-hearted disagreement with a case previously decided by that Court, and then proceed piously to apply it to the case before them, expressing the hope that they will be overruled by the House of Lords. *Olympia Oil & Cake Co., Ltd.* v. *Produce Brokers, Ltd.*

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[21] At p. 339.

[22] See generally Lord Wright, 4 Univ. of Toronto L.J. (1942) 247, repr. Camb.L.J. 118.

[23] (1944) K.B. 718. And see Professor Goodhart, 9 Camb. L. J. 349.

(1915)[24] is a pathetic example. Buckley, L.J., in that case says: " I am unable to adduce any reason to show that the decision that I am about to announce is right. On the contrary, if I were free to follow my opinion, my own powers of reasoning, such as they are, I should say it is wrong. But I am bound by authority, which of course it is my duty to follow ", and Phillimore, L.J., says: " With reluctance, I might almost say with sorrow, I concur in the view that this appeal must be dismissed. I trust that the case will proceed to the House of Lords ". The House of Lords duly overruled the Court of Appeal,[25] Lord Sumner saying : " On these grounds I think that the Court of Appeal, though bound to follow the earlier decisions, were right in indicating objection to them, and further that in your Lordships' House that objection should prevail ". Tragicomic as the situation may seem, the losing party in the Court of Appeal has at least a chance to get justice as a result of another hearing not prejudiced by an erroneous precedent, but the House of Lords affixes to its words the seal of finality.

It may be objected that the law as laid down by the House of Lords is in the last resort subject to the overriding legislative powers of Parliament, and that Parliament may be counted on to put right any flaws that may appear in the judge-made law. But legislative methods and procedure being what they are, it is for the most part idle to count on legislation to correct the errors of the judiciary. As Dr. Allen points out[26]: " If the self-imposed adaptations of the Common Law are slow, the reforms of legislation are even slower. Again and again the most obvious and urgent corrections of the law have to wait for many years before they can be achieved, or before they can even claim interest and attention, and this is more than ever true today, when the press of ' social ' legislation is such, and the time of Parliament is so crowded, that mere ' lawyer's law ' has little appeal for the legislator ". Dr. Allen even goes so far as to contend that the indifference of the layman politician to lawyer's law is a far greater impediment to law reform and progress than the alleged conservatism of the legal profession.[27]

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[24] 112 L.T. 744. See Professor Goodhart, 50 L.Q.R. 40.

[25] [1916] 1 A.C. 314, 332.

[26] *Law in the Making* (4th ed.), p. 295.

Furthermore, the fear that the judiciary will arrogate to itself legislative powers obviously rests on the naive belief, widespread ever since Blackstone's writings, that in administering justice Judges merely discover the law, and never make it, that law exists from time immemorial and the Judges are merely the mouths which pronounce it. This "childish fiction", as it has rightly been called by Bentham, has now been discarded by most writers and lawyers, and it is not proposed to repeat here the familiar arguments. Suffice it to say that today there is everywhere a growing emphasis on the analogy between the function of the Judge and the function of the legislator. This analogy is one of the theses of Gény. "*A priori*", he says, "the process of research which is imposed upon the Judge in finding the law seems to us very analogous to that incumbent on the legislator himself. . . . The considerations which ought to guide it are, in respect of the final end to be attained, exactly of the same nature as those which ought to dominate legislative action itself, since it is a question in each case of satisfying, as best as may, justice and social utility by an appropriate rule".[28]

Another argument advanced in favour of the rule is that equality of treatment of all by the law is in itself a requirement of justice. But surely this statement must be qualified so as to read—equality of *just and equitable* treatment of all is a requirement of law, and cannot be extended to mean that because the Court made an error in the case of plaintiff A, and in consequence denied him justice, it should repeat the same error in the case of plaintiff B, so that he too, in equality with A, shall suffer a denial of justice. As Professor

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[27] *Op. cit.*, p. 266n.

[28] *Méthode d'Interprétation et Sources en droit privé positif*, Vol. 2, p. 77. Transl. in 9, *Modern Legal Philosophy Series.*

Paton asks[29]: "Should we carry our natural love of equality as an attribute of justice so far as to treat twenty plaintiffs unjustly because one binding case laid down an unjust rule? Is it better to be ultimately right or consistently and persistently wrong?" Perhaps we may answer these rhetorical questions in the words of Cardozo, J.[30] "One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savours of prejudice or favour or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development. . . . But symmetrical development may be bought at too high a price. *Uniformity ceases to be a good thing when it becomes uniformity of oppression.* The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the Judge the duty of drawing the line at another angle, of staking the path along new courses, of making a new point of departure from which others who come after him will set out upon their journey".

Next, there is the reasoning of Jessel, M.R., in *Ex p. Willey* (1883).[31] He said: "Where a series of decisions of inferior Courts have put a construction on an Act of Parliament and have thus made a law which men follow in their daily dealing, it has been held, even by the House of Lords, that it is better to adhere to the course of decisions than to reverse them, because of the mischief that would result from such a proceeding. Of course that requires two things—antiquity of decision and the practice of mankind in conducting their affairs". This is the familiar reasoning of the maxim *communis error facit jus.* It will be noticed that it was applied by Jessel, M.R., not specifically to cases where the House of Lords is asked to overrule a previous decision of its own, but to the considerations generally to be taken into account by a superior Court when reviewing the decision of an inferior Court. In such a case, although the maxim applies, nobody takes it to mean that a Judge is precluded from overruling the decision appealed against, but merely that in deciding whether or not so to overrule it, he must take the maxim into account, as one of the factors in the situation. It goes without saying that the same consideration would apply with even greater force if the House of Lords were granted the right to overrule itself, and that in exercising that right the House would show even greater restraint than it did hitherto in the exercise of its appellate jurisdiction over inferior Courts. But here too the meaning of the maxim cannot be extended to imply that the House is altogether precluded from overruling its past erroneous decisions. The position may be summed up in Lord Loreburn's words[32]: "Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, *if* it has not lost the right to do so by itself expressly affirming them". An admirable statement of principle, but for that last "if".

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[29] *A Textbook of Jurisprudence*, p. 163.
[30] *The Nature of the Judicial Process*, p. 112.
[31] 23 Ch.D. 118, 127.

Another, closely related, argument is that put forward by Lord Campbell in *Bright* v. *Hutton*[33]: "This House cannot decide something as law today and decide differently the same thing tomorrow; because that would leave the inferior tribunals and the rights of the Queen's subjects in a state of uncertainty". The same argument had been stated by Lord Eldon in *Sheddon* v. *Goodrich*[34]—"It is better that the law be certain than that every Judge should speculate upon improvement in it". Now the quest for certainty in the law is probably as old as civilized society itself, and is of course quite legitimate and understandable. Again, the danger lies in elevating the desirability of certainty to the position of the sole or even chief aim of the law. Here too the Judge must be given some latitude to balance the social interest served by certainty against the social interest served by equity and justice. After all, the consideration of certainty has not prevailed to protect the interests of the man who has trusted to the judgment of an inferior Court, which has later been overruled by a superior Court. " In this case ", Cardozo says,[35] " the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty." There seems to be no cogent reason why the same enlightened view should not be adopted as to the possible consequences of the House being given the power to overrule its own decisions. And can it be really said that even the cause of certainty was served by the decision in *Beamish* v. *Beamish*, or did not the case result rather in the negation of certainty, upsetting every logical expectation upon which the parties had framed their conduct for many years? Besides, it has been doubted in recent years whether the achievement of any substantial degree of certainty in the law is at all possible. There is much substance in Jerome Frank's view, that " if there can be nothing like complete definiteness in the natural sciences, it is surely absurd to expect to realize even approximate certainty and predictability in law, dealing as it does with the vagaries of complicated human adjustments ".[36]

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[32] *West Ham Union* v. *Edmonton Union*, [1908] A.C. 1, 4.

[33] *Ibid.*, at p. 392.

[34] (1803) 8 Ves. 481, 497.

The last argument to which we shall turn our attention is that of Lord Halsbury himself in delivering the judgment in *London Street Tramways* v. *L.C.C.* He said : " What is that occasional interference with what is perhaps abstract justice compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued . . .". This remarkable plea for the convenience of Courts constitutes, as has been pointed out by Lord Wright,[37] a quite unwarranted extension of the scope of the principle of *res judicata*, which was always understood to apply only to matters of fact as between the parties, to questions of law as against subsequent litigants. It is the duty of Judges to administer justice, and their convenience cannot be allowed to stand in the way of their fulfilment of that duty.

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[35] *Op. cit.*, p. 148.

[36] *Law and the Modern Mind*, 7. As to the extent of uncertainty in the law even under the present strict doctrine of *stare decisis*, see Salmond, *Jurisprudence* (10th ed.), 197–8; Friedmann, *Legal Theory* (2nd ed.), 287 *et seq.*; Stone, *Province and Function of Law*, Ch. 7.

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Such are the arguments by which it has been attempted to justify the impotence of the House of Lords to correct its own errors. We have seen them, one by one, to be of no substance whatsoever. Equality of treatment, the maxim of *communis error* and the desirability of certainty in the law are factors to be taken into consideration by the House when reviewing its past decisions, not reasons for divesting it of all power of such review. We have seen that the rule found its way into the law on most questionable grounds and as a result of unsound legal reasoning. Looking at the practice of other Courts of last resort, we see that the House of Lords stands alone in disclaiming all power to correct itself. The Judicial Committee of the Privy Council holds itself free to reconsider its own previous decisions,[38] nor has the Supreme Court of the United States ever held itself so bound. The Permanent Court of International Justice, and now the International Court of Justice, have developed a very fine body of jurisprudence without adopting the principle of *stare decisis* altogether.[39] Finally, we have seen what pernicious results the rule has wrought. On all accounts the rule stands condemned. It is in the interest of justice and social welfare, as well as in the interest of the consistent high quality of the law itself, that an end shall be put to it.

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[37] *Op. cit.*, at p. 250, or 8 Cam.L.J. 122.

[38] *Ridsdale* v. *Clifton* (1877), 2 P.D. 276, 306. For a recent restatement of the practice of the Committee, see *Att.-Gen. of Ontario* v. *Canada Temperance Federation* (1946), 62 T.L.R. 199.

[39] Statute of the International Court of Justice, Art. 59. Cf. Art. 38 (1) (d).

The rule having been established by the House of Lords itself, it appears to be doubtful whether the House is bound by it—the Legislature in its own sphere cannot in like manner restrict its own future action.[40] It would seem, then, that the House of Lords would be quite within its constitutional rights were it to overrule the decision in *London Street Tramways* v. *L.C.C.* Should it appear, however, that after over fifty years that decision is so firmly embedded in our law, and judicial practice in the matter has become so hardened, that it is now too late in the day for such reasoning to commend itself to their Lordships, the Legislature should step in and free the House of Lords from the fetters it has forged on its own feet.

JACOB E. LANDAU.

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[40] Dicey, *The Law of the Constitution* (9th ed.), 64–70.

SOME ASPECTS OF THE PROBLEM OF SUPERIOR ORDERS IN THE LAW OF WAR.[1]

FEW would deny that the plea of superior orders has proved to be the most controversial, as well as the most important, matter incidental to the punishment of war crimes. There are, I believe, two main reasons for this. First, in order to establish the existence of *mens rea* as a condition of individual or collective criminal responsibility regard must be had to the circumstance that violations of the laws of war may have been carried out in obedience to superior orders; and secondly, great difficulty attends upon efforts to attain a just reconciliation between the imposing demands of military discipline and the necessity for preserving the supremacy of the law. While in principle the question of superior orders is raised whenever an act is performed by a subordinate owing some recognized duty of obedience to a duly constituted superior authority, in practice the problem assumes its greatest significance in connection with the relationship of disciplinary subordination which exists between various ranks of the armed forces. It is therefore proposed to discuss the matter chiefly from that aspect.

In view of the paucity of international practice and authority in the matter prior to the Second World War it is necessary to approach the subject on the basis of general principles of criminal law.

(1) *The Doctrine of Superior Orders in British and United States Law.*

Two hundred and fifty years ago military discipline in the armed forces was characterized by its extreme rigour. The British Military Code of 1715, for example, provided that "any officer or soldier who should refuse to obey the military orders of his superior officer" would be liable to capital punishment. No qualification as to the lawfulness of the command appeared in the Code but in 1749 the wording was modified so as to render criminal disobedience to any *lawful* command.[2] Early in the nineteenth century, moreover, at a time when, as Dicey says, "no one can suppose that the Judges were disposed to underrate the rights of the Crown and its servants", it became evident that the fact of a person being a soldier and of his acting strictly in obedience to orders did not of itself relieve him of criminal liability for acts which would be crimes if committed by a civilian. This principle has been reiterated in numerous British and United States decisions from the beginning of the last century up to the present day.

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[1] Paper read before the Haldane Society on April 25, 1951.

It has been asserted[3] that in the earliest and most authoritative United States cases the subordinate was held to strict criminal liability whenever the order was unlawful even although there was reasonable doubt of its illegality; and that the harshness of the result was sometimes avoided by pardon after conviction. This contention seems to be based substantially on the doctrine of strict accountability enunciated by the United States Supreme Court in *Little* v. *Barreme*[4] and sustained by the Court in several later decisions.[5] Nevertheless, it should be observed that these were civil actions against the subordinates concerned for damages in tort; and thus the principle of accountability was necessarily more strictly applied and exemption appeared to be limited only to those occasions on which the orders were in fact lawful. Moreover, the decisions of Federal and State Courts do not generally support the doctrine of strict accountability even in respect of the tortious liability of military subordinates.[6] Whatever may be the doctrine of accountability in tort it seems clear that in criminal law the Courts of the United States have preferred to adopt the more reasonable and practical test of qualified accountability. As early as 1813 this doctrine was voiced in *U.S.* v. *Jones*,[7] a prosecution for piracy. During the war of 1812 certain members of the crew of an American privateer stopped and searched a neutral Portuguese vessel on the high seas, assaulted the captain and crew, and stole valuables. Jones and others pleaded that they had merely carried out the orders of their captain. Circuit Justice Washington, charging the jury, said: "This doctrine, equally unfounded . . . , is repugnant to reason and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse much less justify the act. Can it be for a moment pretended that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not. In relation to the navy let it be remarked that the 14th Section of the law for the better government of that part of the public force which enjoins on inferior officers or privates the duty of obedience to their superior cautiously speaks of *lawful* orders of that superior. Disobedience of an unlawful order must not of course be punishable; and a court martial would in such a case be bound to acquit the person tried upon a charge of disobedience. We do not mean to go further than to say that the participation of the inferior officer in an act which he *knows, or ought to know to be illegal,* will not be excused by the order of his superior". A similar conclusion was reached three years later by Story, J., in a case[8] in which a sentry on board a ship executed the orders of a naval officer to run through the body any man who abused him by words. Numerous cases since then may be said to have established the doctrine of qualified subordinate liability by taking into account the requirements of military discipline so as to modify the rule of strict accountability either by reference to circumstances in which the subordinate "ought to have known" that the order was unlawful or by granting him immunity if the order was not "manifestly illegal".[9] It is of interest to compare the attitude adopted by the High Court of Justiciary of Scotland as early as 1807 in the trial of Ensign Maxwell for the murder of Charles Cottier, a French prisoner of war.[10] Maxwell was in charge of three hundred prisoners of war at Greenlow. The building in which they were confined was of no great strength and afforded some possibility of escape; to prevent which, the prisoners being unruly, an order was given that all lights were to be put out at 9 p.m.; if not done at the second call, the guard would fire upon the prisoners, due notice having been given. On the night in question there was a commotion in the prison. Maxwell's attention having been drawn to it he observed a light burning after the appointed hour and twice ordered it to be put out. This order not being obeyed he directed the sentry to fire, which he did, Cottier receiving a fatal wound. Maxwell was found guilty and sentenced to nine months' imprisonment. Maxwell's plea that he was merely executing superior orders was rejected by the Court, which charged the jury as follows: " If an officer were to command a soldier to go out to the street and to kill you or me he would not be bound to obey. It must be a legal order given with reference to the circumstances in which he is placed; and thus, every officer has a discretion to disobey orders against the known laws of the land ". It is rather surprising to find that during the last hundred and fifty years English Judges have rarely been called upon to enunciate a rule of law in the matter of superior orders. The few relevant cases leave one with the impression that English Courts, especially in the early part of last century, did not welcome litigation involving an examination of military affairs or which might set an unhealthy precedent by encouraging members of the armed forces to air their grievances in public and to bring actions tending to impair respect for military discipline. The case of *Sutton* v. *Johnstone*,[11] decided in 1786, has, on occasion, been cited in support of the doctrine of absolute obedience to superior orders. In the course of his opinion

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[2] *British Manual of Military Law*, Ch. III, paras. 10 and 12. But cf. section 4 of the British Naval Discipline Act, 1866, which provides, on penalty of death, for implicit obedience to orders commanding "any action or any service". Sir Graham Bower, citing this Act in connection with the segregation of German submarine officers in the British Naval Detention Barracks in March, 1915, by order of the British Government as a reprisal for unrestricted submarine attacks against British and neutral vessels, took the view that to make such an officer responsible for the legality of the orders of his superior authority was "to strike at the foundations of discipline in every army and navy in the world": *Grotius Society*, 1 (1916), pp. 31–32. It is necessary, however, to have regard also to Article 17 of the Act which provides for punishment in the event of disobedience to any *lawful* command of a superior officer.

[3] Glueck, *War Criminals, their Prosecution and Punishment* (1944), p. 149.

[4] (1804), 2 Cranch 170.

[5] See, for instance, *Mitchell* v. *Harmony* (1851), 13 Howard 115; *Dow* v. *Johnson* (1879), 100 U.S. 158. And see the judgment of the Supreme Court of Massachusetts in *Commonwealth* v. *Blodgett and Another* (1846), 12 Metcalf 56; Scott, *Cases on International Law* (1902), p. 308 at p. 313.

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[6] See the note in *Harvard Law Review*, 55 (1942), p. 653, which says: "While the Supreme Court has never deviated in language from the view taken in *Little* v. *Barreme* . . . this doctrine of strict accountability has been qualified in many State and lower federal decisions and criticized by the few modern text writers who have discussed the subject. The rule that is most widely accepted today is a more lenient one: the subordinate is liable for executing an unlawful command only when he believed it was illegal, or when it was so palpably illegal that a reasonable man would have realized its invalidity". For United States decisions concerning the tortious liability of members of the armed forces see *ibid.*, pp. 653–655 and footnotes. And see the cases collected in Winthrop, *Military Law and Precedents* (2nd ed., 1920), p. 887, note 52.

[7] 26 Fed.Cases 653, 657–658, No. 15, 494 (C.C.D.Pa., 1813).

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[8] *United States* v. *Bevans* (1816), 24 Fed.Cas. 1138, No. 14, 589 (C.C.D.Mass., 1816). Justice Story said: "Such an order would be illegal and void, and not binding upon any person; and the party who should give the order, equally with the party who should execute it, would be involved in the guilt of murder". *Ibid.*, p. 1140.

[9] See, for instance, *U.S.* v. *Carr* (1872), 25 Fed.Cas. 306, No. 14, 732 (C.C.S.D.Ga., 1872), in which an American sergeant was prosecuted for having shot and killed a soldier who had used disrespectful language. The plea of the accused that he had acted in obedience to the orders of a superior non-commissioned officer was not accepted by the Judge who stated that a soldier is bound to obey only the lawful commands of his superior and that an order to shoot for use of disrespectful words would if executed, be murder in both the person giving the order and the person carrying it out. In *Re Fair* (1900), 100 Fed.Cas. 149 (C.C.A. 9th, 1900), the Judge, following a test laid down in the civil case of *McCall* v. *McDowell* (1867), 15 Fed.Cas. 1235, said that the "illegality of the order, if illegal it was, was not so much so as to be apparent and palpable to the commonest understanding. If, then, the petitioners acted under such order in good faith without any criminal intent but with honest purpose to perform a supposed duty, they are not liable to prosecution under the criminal laws of the State". *Ibid.*, p. 155. See also *Commonwealth Ex rel. Wadsworth* v. *Shortall* (1903), 206 Pa.St. 165 and the more recent case of *Neu* v. *McCarthy* (1941), 309 Mass. 17, in which the commanding officer of the accused (a private soldier) illegally ordered the latter to drive over a crossroad regardless of the traffic lights. The Judge said: "Failure of instant obedience leads to military punishment which may be severe. Recognition of the peculiar necessity of discipline in the military service . . . has led Courts in well considered cases to regard obedience to a military order as a justification for conduct which would otherwise give rise to . . . criminal liability unless the order is so palpably unlawful that a reasonable man in the position of the (soldier) obeying it would perceive its unlawful quality". *Ibid.*, pp. 22–23.

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[10] Buchanan, *Reports of Remarkable Trials* (1813), Part II, pp. 3, 58.

[11] 1 T.R. 493.

in the House of Lords, Lord Mansfield said: " A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey; nothing can excuse him but a physical impossibility ". Those remarks were, however, merely *obiter* and, in any event, it seems clear from the facts of the case and from the context that the Judge had in mind only the question of the danger or expediency, from the point of view of a subordinate, of an order to carry out *lawful* acts of warfare. However, in the case of *Rex* v. *Thomas*,[12] decided in 1816, the matter was directly before the Court. The accused was a sentinel on board a man-of-war at anchor in the Medway. He had been ordered to keep boats away while the ship was paying off and had been given for the purpose a musket with blank and ball ammunition. He called repeatedly to certain boats to keep off but when one persisted in getting close to the ship he fired and killed an occupant. The jury found that it was the accused's mistaken impression that it was his duty to fire; but the Judges, on a case reserved, unanimously held the act to be murder, though a proper case for pardon. In the present century the rule laid down in 1900 by Mr. Justice Solomon in the South African case of *Regina* v. *Smith*[13] seems to have been generally accepted as authoritative. During the Boer War a patrol of British soldiers, sent out on a dangerous mission, indulged in an argument with a recalcitrant native who had hesitated about finding a bridle for one of their horses. Acting in obedience to the orders of Captain Cox, his superior officer, Smith, one of the soldiers, killed the native on the spot. After the war a special Court, set up under the Indemnity and Special Tribunals Act of 1900, tried Smith for murder. The Court held that "the order was not so plainly illegal that Smith would have been justified under the circumstances in refusing to obey it". In acquitting the accused the Court stated the rule in the matter of superior orders in terms which, in emphasis, are more advantageous to the soldier than the principle to be deduced from some of the older United States decisions. The President of the Court, Mr. Justice Solomon, said: "I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying commands of his superior and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer".[14]

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[12] 4 Maule and Selwyn 414. The case of *Keighley* v. *Bell* (1866), 4 F. & F. 763, is sometimes cited because of the *obiter dicta* of Willes, J., who, in the course of his judgment, said: "I hope I may never have to determine that difficult question, how far the orders of a superior officer are a justification. Were I compelled to determine that question, I should probably hold that the orders are an absolute justification in time of actual war, at all events as regards enemies or foreigners, and, I should think, even with regard to English-born subjects of the Crown, unless the orders were such as could not legally be given. I believe that the better opinion is that an officer or soldier acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders ".

[13] 17 Cape Reports 561.

Turning to British and American military law we find that, in effect, the same rule is observed. Under the British Army Act a soldier must obey any lawful command given by his superior officer in the execution of his office.[15] If, however, the "command is obviously illegal, the subordinate would be justified in questioning or even in refusing to execute it as, for instance, if he were ordered to fire upon a peaceable and unoffending bystander".[16] The qualification of lawfulness also appears to have existed in the United States Articles of War since the inception of an organized American army.[17] The American commentator Winthrop maintains that, according to United States military law, the subordinate would be entitled to disobey an order which was " so manifestly beyond the legal power and discretion of the commander as to admit of no rational doubt of its unlawfulness ".[18] Such was the case in the trial of Henry Wirtz in 1865. Wirtz was a German who, during the American Civil War, had held a commission in the Confederate army. At the conclusion of the war he was tried by a Military Commission in Washington and convicted of ill-treating 45,000 prisoners of war in his charge at Andersonville, Georgia, and of the murder of some of them himself. He was sentenced to death and executed. In answer to the plea put forward by Wirtz that he had merely carried out the orders of his superior commander the Judge Advocate said : " A superior officer cannot order a subordinate to do an illegal act and if the subordinate obey such an order and disastrous consequences result, both the superior and the subordinate must answer for it. General Winder could no more command the prisoner to violate the laws of war than could the prisoner do so without orders ".[19]

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[14] Elsewhere in the judgment Mr. Justice Solomon said: "A soldier is responsible by military and civil law and it is monstrous to suppose that a soldier would be protected where the order is grossly illegal. The Court cannot therefore decide that a soldier is bound to obey any order that may be given him. Then there is the second proposition: that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly legal. That is an extreme proposition which the Court cannot accept for its guidance. . . . Although he is only bound to obey lawful orders, he is protected in obeying some orders not strictly legal. If in any doubtful case a soldier were entitled to judge for himself, to consider the circumstances of the case, and to hesitate in obeying orders given him, that would be subversive of all military discipline. One must remember that especially in time of war immediate obedience to orders is required from a private soldier, and that therefore it is not desirable that a soldier should be encouraged to question the order given him by his superiors in cases where there is some doubt as to whether the order is lawful or not".

[15] Section 9. Note 4 to section 8 of the Act refers to the difficulty of defining the phrase "in the execution of his office" but declares that the military knowledge and experience of the members of a court-martial will enable them, in most instances, readily to determine whether the superior is or is not in execution of his office.

[16] *British Manual of Military Law*, Ch. III, para. 13.

The doctrine according to which the order of a superior authority constitutes an absolute defence appeared in 1906 in the first edition of the treatise on international law by Professor Oppenheim. In that part of the work devoted to a discussion of the punishment of war crimes Professor Oppenheim formulated the following rule : " It is important to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy".[20] It is probable that at the time the adoption of this rule was unlikely to cause apprehension seeing that few would have thought it possible that in the future any Government would issue orders for the systematic and wholesale commission of crimes. No rationale for this doctrine was given in the 1906 edition but in the third edition published in 1921 a footnote was inserted to the effect that "the law cannot require an individual to be punished for an act which he was compelled by law to commit". From what has already been said it would appear that the fallacy in this assertion is the assumption that the law enjoins obedience to commands which are unlawful. About 1908, Colonel, now Brigadier-General, Sir James Edmonds prepared a draft of a chapter on the laws and usages of war on land to be inserted in the *British Manual of Military Law.* The then Secretary of State for War, Mr. Haldane, decided that before publication the draft should be submitted to Professor Oppenheim. The latter suggested that the rule in the matter of superior orders as set forth in his treatise should be incorporated in the draft.[21] This was done[22] and the draft became Chapter XIV of the sixth edition of the *British Manual of Military Law* published in 1914. A similar provision was also embodied in the United States Manual.[23] Although Professor Oppenheim's version of the rule survived without correction through several editions of his treatise it is only fair to say that the relevant footnotes in succeeding editions cast increasing doubt upon the validity of the rule as expounded in the body of the text. In 1940, however, the text of the treatise was revised so as to accord with the generally accepted principle of law in the matter; and in 1944 amendments to the same effect were inserted in both the British and United States Manuals. The retention for over thirty years of Professor Oppenheim's doctrine of subordinate immunity is the more surprising seeing that the Birkenhead Committee of Enquiry on War Crimes set up by the British Government in 1918—only four years after the publication of Chapter XIV—unanimously reported that the statement in the Military Manual lacked authority and that the Committee could not accept the doctrine that it was the duty of a soldier never to question an order which he received.[24] The Committee (which included among its members Sir Frederick Pollock and Professor Pearce Higgins) went on to recommend that the plea of superior orders should not be accepted by Courts set up for the purpose of trying alleged German war criminals if it could be proved that the acts charged were flagrantly and obviously contrary to the laws and customs of war. The Inter-Allied Commission of the Paris Peace Conference of 1919 adopted the same view.[25]

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[17] Article 64 of the *United States Articles of War*. It is reported that during the American Civil War in 1865 Colonel W. E. Peters, a Confederate officer, disobeyed an order to burn the town of Chambersburg. See Stowell and Monroe, *International Cases*, vol. ii, pp. 235–236. Colonel Peters was promptly placed under arrest for disobedience to orders but he was never brought to trial.

[18] *Military Law and Precedents* (2nd ed., 1920), p. 296. Examples of such commands include " a command to violate a specific law of the land or an established custom or written law of the military service, or an arbitrary command imposing an obligation not justified by law or usage ". *Ibid.*, p. 297.

[19] *Grotius Society*, 8 (1922), p. xxv.

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[20] *International Law* (1st ed., 1906), vol. ii, s. 253.

[21] See the speech of Lord Hankey in the House of Lords (*Parliamentary Debates, House of Lords*, vol. 168, number 46, July 19, 1950).

[22] Article 443, Ch. XIV.

[23] Article 366 of the *United States Rules of Land Warfare*, 1914.

(2) *The Rule in Germany.*

Although the standard of discipline maintained in the German armed forces was notoriously high, no German writer, with the exception of Professor Oppenheim, appears to have regarded the duty of obedience to superior orders as unconditional. Even in 1940 one of the leading German commentators, Professor Schwinge, wrote: "Hence in military life, just as in other fields, the principle of absolute, *i.e.*, blind obedience, does not exist."[26] The United States Military Tribunal in the trial of *Ohlendorf and Ors.* in 1948 said: "One of the most generally quoted statements on this subject is that a German soldier must obey orders though the heavens fall. The statement has become legendary. The facts prove that it is a myth".[27] As far back as

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[24] Morgan in *Quarterly Review*, 285 (1947), p. 330.

[25] *Ibid.*, p. 330.

[26] *Re Ohlendorf and Ors.*, transcript, pp. 6728–9.

[27] *Ibid.* In the trial of General Dostler in October, 1945, by a United States Military Commission it is reported that one of the witnesses, General von Saenger, was asked by the prosecution whether he could cite a single instance in which a general officer

1845 the Prussian Military Code recognized the principle of moral choice by providing that a subordinate would be punished if, in the execution of an order, he went beyond its scope or if he executed an order knowing that it " related to an act which obviously aimed at a crime ". This provision was embodied in the Military Penal Code of the Kingdom of Saxonia in 1867, and of Baden in 1870. Continuing and even extending the doctrine of conditional obedience the Bavarian Military Penal Code of 1869 went so far as to establish the responsibility of the subordinate as the rule and his immunity as the exception. The Military Penal Code of the Austro-Hungarian monarchy of 1855 provided in Article 158 : " A subordinate who does not carry out an order is not guilty of a violation of his duty of subordination if : (a) the order is obviously contrary to loyalty due to the Prince of the land ; (b) the order pertains to an act or omission in which evidently a crime or an offence is to be recognized ".[28] The rule operative in German military law during the Second World War was that laid down in Article 47 of the German Military Penal Code of 1872. This Article provided : " If through the execution of an order pertaining to the service a penal law is violated then the superior giving the order is alone responsible. However, the obeying subordinate shall be punished as an accomplice (*Teilnehmer*) ; (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior involved an act which aimed at a civil or military crime or offence ".[29]

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of the German army had been executed for disobedience to a superior order. The witness replied that he had heard of two cases, one of which he knew; the second being merely a rumour. W.C.R., 1 (1947), p. 27. The designation " W.C.R." refers to the law reports of trials of war criminals prepared by the United Nations War Crimes Commission.

[28] *Re Ohlendorf and Ors.*, transcript, pp. 6728–9.

[29] An amendment to this provision in 1940 deleted the last two words " to him " in sub-section (1) and in sub-section (2) changed the words " civil or military crime or offence " to " general or military crime or offence ". In *Re Leeb and Ors.*, W.C.R. 12 (1949), p. 73, the tribunal said that if this amendment had any effect it extended rather than restricted the scope of the provision. See also *Re Ohlendorf and Ors.*, transcript, pp. 6729–9. And see the Austrian *Allgemeines Strafgesetzbuch* of 1852 (as amended by the Act of July 15, 1920) paras. 535 and 560. Section 52 of the German Penal Code provides : " A crime has not been committed if the defendant was coerced into performing the act by irresistible force or by a threat which is

Sheldon Glueck has pointed out[30] that German decisions have interpreted sub-section (2) of this Article to require a finding (a) that the order of the superior was *aimed* at the commission of a crime, and (b) that the subordinate *knew* such was the superior's intention when the latter issued the order. Mere doubt as to the superior's aim is not enough to render the subordinate responsible. It thus appears that in practice sub-section (2) of Article 47 has been so restrictively interpreted in Germany that, in the words of Lord Cave, "it might as well not exist".[31] Nevertheless, in the *Llandovery Castle* (1921)—a case which concerned the killing of the survivors of a torpedoed hospital ship who had taken refuge in life-boats—the German Imperial Supreme Court held that a military subordinate is not entitled to obey without question an order which is "universally known to everybody, including also the accused, to be without any doubt whatever against the law".[32] Joseph Goebbels, the former German Minister of Propaganda, published in the *Voelkischer Beobachter* of May 28, 1944, a statement to the effect that "it is not provided in any military law that a soldier in the case of a despicable crime is exempt from

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connected with a present danger to life and limb of the defendant or his relatives which danger could not otherwise be eliminated". Article 64 of the French Penal Code provides that an act committed by a person under compulsion is neither a crime nor a misdemeanour (*délit*). Professor Nast has expressed the opinion that this immunity would apply to a soldier compelled to commit a violation of the laws of war: *R.G.*, 26 (1919), p. 123. See also Renault in *Clunet*, 42 (1915), pp. 341–342. Professor Mérignhac, on the other hand, maintains that Article 64 was never intended to protect soldiers who, in time of war, commit atrocities and who afterwards seek refuge under the plea of superior orders: *R.G.*, 24 (1917), pp. 49–53. Garner in *A.J.*, 14 (1920), p. 87, says that the great majority of French jurists adopt the view of Mérignhac. See also Article 327 of the French Penal Code which excludes liability in case of acts "*ordonnés par la loi et commandés par l'autorité*". But Coste Floret in *Recueil Dalloz* (1945), Chronique IV, says that it is obvious that this provision does not apply to violations of the laws of war. Articles 70 and 71 of the Belgian Penal Code substantially reproduce Articles 64 and 327 of the French Penal Code.

[30] Glueck, *op. cit.*, p. 241.

[31] *Grotius Society*, 8 (1922), p. xxii. See also Sheldon Glueck, *op. cit.*, pp. 152–154. Counsel for Jodl before the Nuremberg International Tribunal asserted that German military Courts had limited the application of Article 47 (2) in order to protect the obedient soldier as much as possible; and that during thirty years' service Jodl did not remember a single case in which a subordinate had been punished under the Article. *Proceedings* (Paper edition published by H.M.S.O.), Part 19, p. 153.

[32] *Annual Digest*, 1923–1924, Case No. 235.

punishment because he passes the responsibility to his superior especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare ". Approbation is quickly dispelled, however, when one learns that Goebbels invoked this principle of law as a convenient pretext for inciting the German population to lynch Allied airmen alleged to have carried out bombing attacks against non-military objectives.

While the rule in the matter of superior orders seems to have become firmly established in the municipal law of leading States it cannot be said that this was altogether so in the sphere of international law.

(3) *International Conventions and Practice.*

Between the two World Wars little regard was in fact paid to the question of superior orders in international treaties and conventions. The matter was touched upon by the Commission created in 1919 by the Preliminary Peace Conference for the purpose of " inquiring into the responsibilities relating to the war ". In its report of March 29, 1919, the Commission stressed that civil and military authorities could not be relieved of responsibility by the mere fact that a higher authority might have been convicted of the same offence; and that it would be for the Court to decide whether a plea of superior orders should be sufficient to relieve the person charged of responsibility.[33] Article 3 of the abortive Washington Convention of 1922[34] certainly provided that any person who violated any of the rules relating to attacks upon and the seizure and destruction of merchant ships, whether or not such person acted under orders of a governmental superior, should be deemed to have violated the laws of war and be liable to trial and punishment as if for an act of piracy. But it is perhaps indicative of the controversial nature of the problem in international law that although the London Convention of 1930 embodied similar principles of maritime warfare the repudiation of the defence of superior orders was omitted.[35] Moreover, the draft convention relating to the rules for the control of radio in time of war prepared by the League of Nations Commission of Jurists in 1923[36] provided that radio operators should incur no personal responsibility from the mere fact of carrying out the orders which they had received in the performance of their duties.[37]

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[33] *History of the United Nations War Crimes Commission* (1948), pp. 274–275.

[34] This Treaty was ratified by the Governments of the United States, Great Britain, Italy and Japan, but owing to the refusal of the French Government to ratify it, the Treaty has never come into force. See also the British Treaty of Washington Act of 1922. Several writers have maintained that the incorporation in the Convention of an express provision with regard to superior orders furnishes evidence of the validity of the defence after the First World War: Manner in *A.J.*, 37 (1943), p. 417; Schick in *Toronto University Law Journal*, 7 (1947–8), p. 50.

In the early years of the Second World War the problem of superior orders was discussed by numerous unofficial bodies all of which seem to have rejected the plea as an absolute defence. It was apparent from their deliberations that the question was still regarded as one concerning primarily the relationship of military subordination which exists between various ranks of the armed forces. There did not appear to be any attempt to determine the limits within which the plea of superior orders might constitute an effective defence and it was to be left open to the Court to consider, having regard to the circumstances of each particular case, whether the accused ought to be exonerated from liability or his punishment mitigated. It was, however, generally agreed that the plea of superior orders was of no avail when the offence, by reason of its heinousness, brutality, or ruthless disregard for the sanctity of human life, clearly violated established rules of warfare or shocked the general sentiments of humanity.[38] The complexity of the problem was also fully appreciated by the United Nations War Crimes Commission and by the various committees set up under its authority to consider the application of the laws of war in war crimes trials to be held by the Allied nations after the cessation of hostilities.[39] In fact, the Chinese representative, in a report to the Legal Committee, expressed the opinion that "it would be futile to attempt to formulate, by means of an agreement among the United Nations, an absolute rule in regard to the plea of superior orders . . . and that the validity of the plea should be left to be determined by the national Courts of the United Nations according to their own views of the merits and limits of the plea".[40] The Commission eventually agreed upon a formal report to the Governments in which it stated that, having regard to the diversity in law and practice existing between many of the member States, and to the fact that each particular case must be decided on its merits, "the Commission does not consider that it can usefully propound any principle or rule". The Commission unanimously maintained, however, that the plea of superior orders did not, *ipso facto*, relieve a person acting thereunder from criminal responsibility for a war crime.[41]

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[35] Spaight, *Air Power and War Rights* (1947), p. 57, maintains that it must be presumed that this provision was deliberately excluded from the corresponding part of the London Convention.

[36] For the General Report of the Commission of February 19, 1923, see *A.J.*, 32 (1938), Supplement, pp. 1 ff; Great Britain, *Parl. Papers*, Cmd. 2201, Misc. No. 14 (1924). The Commission was composed of the following members: J. B. Moore, President of the Commission (U.S.A.); Sir C. J. B. Hurst (Great Britain); A. de Lapradelle and Basdevant (France); Ricci (Italy); K. Matsue and M. Matsuda (Japan); A. Struycken and van Eysinga (Netherlands).

[37] Article 12. The official comment to Article 12 stated: " The operator works in his cabin where he executes the orders of those above him, consequently it is right that he should incur no personal responsibility merely because he has executed orders which he has received in the discharge of his duties as radio operator ". Schick, *op. cit.*, p. 48, maintains that the Commission " reaffirmed the principle of superior command applying it even in such cases where no doubt could exist in the minds of the subordinate organs that the orders given by their superiors were unlawful. . . . Obviously, a radio operator when sending radio distress signals will, in nearly all cases, know whether or not the ship is in distress ". He admits, however, that there are writers who do not accept the plea of superior orders as forming part either of municipal or of international law: *ibid.*, p. 49.

The culmination of this movement in the international sphere towards the formulation of some guiding principle of law to be observed by international and municipal tribunals alike in the treatment of the problem of superior orders may be said to have taken place with the signing of the Charter of the International Military Tribunal for the trial of German major war criminals of August 8, 1945.[42] Article 8 of the Charter provided : " The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires ". Similar provisions were incorporated in the Charter of the International Military Tribunal for the Far East of January 19, 1946, and in Law No. 10 of the Allied Control Council for Germany promulgated on December 20, 1945.[43] Many countries followed suit by enacting legislation concerning the trial and punishment of war criminals which included provisions similar to those in the Charters of the International Military Tribunals and of Control Council Law No. 10 relating to the plea of superior orders.[44]

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[38] See, for instance, the opinion of the committee set up in 1941 to consider rules and procedure applicable to crimes against international public order by the International Commission for Penal Reconstruction and Development (Cambridge): *History of the United Nations War Crimes Commission*, pp. 96, 98; Report of the Commission on War Crimes set up in March, 1942, by the London International Assembly and the resolution of the Assembly itself in 1943, *ibid.*, pp. 101, 275.

[39] *Ibid.*, pp. 277–280.

[40] *Ibid.*, p. 277.

[41] *Ibid.*, p. 280.

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[42] Published as a British Government Command Paper, Miscellaneous No. 10 (1945) Cmd. 6668.

[43] See the *United States Department of State Bulletin*, 14 (1946), pp. 361–362; *Official Gazette of the Control Council for Germany*, No. 3, January 31, 1946.

[44] See, for example, Regulation 5 (d) (6) of the Regulations governing the trials of war criminals (Pacific theatre of operations) of December 5, 1945. Similar Regulations operated in the Mediterranean and Chinese theatres: see W.C.R., 1 (1947), p. 120. See also Article 3 of the French Ordinance of August 28, 1944 (text in W.C.R., 3 (1948), p. 96). For a discussion of this Article and of the problem of superior orders in French Law see Coste Floret in *Recueil Dalloz* (1945), Chronique IV. The Military Penal Code of Czechoslovakia (in this respect based on the Austrian Military Penal Code of 1855) lays down in Article 8 that, subject to Article 158, the order of a superior does not justify the commission of a crime or misdemeanour. Article 158 provides that it is the duty of a subordinate to obey the orders of a superior unless such orders clearly aim at the commission of a crime or misdemeanour. And see the Czechoslovak Law of January 24, 1946 (text in *History of the U.N.W.C.C.*, p. 284); Articles 1 and 5 of the Austrian Law of June 26, 1945 (text in *History of the U.N.W.C.C.*, pp. 284–285); Article 5 of the Polish Decree of December 11, 1946 (text in W.C.R., 7 (1948), p. 88); Article 5 of the Norwegian Law of December 13, 1946 (No. 14) (text in W.C.R., 3 (1948), p. 85); Article 8 of the Chinese Law of October 24, 1946 (see W.C.R., 14 (1949), p. 157). See also the amendment of April, 1944, to Article 443, Ch. XIV of the *British Manual of Military Law* which was based on the revision of the text in *Oppenheim*, *op. cit.*, vol. ii, p. 453, section 253. But compare Articles 40 and 43 of the Dutch Penal Code which appear to recognize generally the defences of necessity and of superior orders and which were not amended either by the Law of December 22, 1943, or by the Law of July 10, 1947: see W.C.R., 11 (1949),

(4) *Superior Orders and War Crimes Trials.*

It is now convenient to examine a number of war crimes trials held after the Second World War in order to try to deduce from the judgments some broad principles applicable to the problem of superior orders.

Having regard to the circumstances in which the plea of superior orders was put forward either as an absolute defence or in extenuation of liability it is as well to distinguish between acts committed by members of the armed forces, police and security services, on the one hand, and acts carried out by civilians on the other. Persons within the former category are subjected to a measure of discipline generally acknowledged as indispensable to their calling. The duty of obedience to military orders is usually imperative.

The plea of superior orders advanced by various accused was usually couched in one of the following forms : (1) that the accused acted in pursuance of the direct orders of Hitler ; (2) that he acted in obedience to the orders of his immediate superior ; (3) that he acted in accordance with the law of his State ; (4) that in carrying out the order he mitigated or attempted to mitigate its severity ; (5) that he carried out the order in the belief that it constituted a justifiable reprisal against unlawful methods of warfare employed by the enemy, and that the reprisal order must have been considered by his Government to be in accordance with international law.

The judgments of international and national tribunals have in the main displayed a commendable uniformity in the matter of superior orders. It can safely be asserted

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pp. 99–100, 102. Such immunity was conditional upon the order having been given by a competent authority acting within the limits of its jurisdiction and it is doubtful whether, in practice, the Dutch Courts regarded the plea as constituting a wider defence than did the Courts of other countries. Article 1 of the Netherlands East Indies Statute Book Decree No. 45 of 1946, on the other hand, suspended the operation of Article 51 of the Netherlands East Indies Penal Code in regard to war crimes. The latter Article provided that, as a rule, a subordinate is not to be punished for a crime committed in the execution of an official order issued by the competent authority. See W.C.R., 11 (1949), pp. 98–99.

that the doctrine which implies the duty of absolute obedience to superior orders has been discredited. But it is also true that the contrary view according to which superior orders can in no circumstances constitute a defence is equally untenable. Almost without exception tribunals have regarded Article 8 of the Charter of the Nuremberg International Tribunal as embodying a well recognized principle of international law binding upon them. A more exacting degree of responsibility has generally been required of superior officers in the armed and police forces than that demanded of subordinate members of such forces. The former are expected to be familiar with the recognized conventional and customary laws of war and have therefore been held responsible for offences which could not perhaps be described as manifestly illegal. In the trial of General Maelzer, the accused, who was the German Military Commander of Rome, was charged with exposing prisoners of war in his custody to acts of violence, insults, and public curiosity. Two hundred American prisoners of war were marched through the main streets of Rome under the escort of German armed guards. The streets were lined with troops under the command of the accused. General Maelzer and his staff officers attended the parade. It was alleged that civilian spectators threw sticks and stones at the prisoners. A film was made of the parade and a large number of photographs later appeared in Italian newspapers and journals accompanied by the caption "Anglo-Americans enter Rome after all . . . flanked by German bayonettes". Maelzer was found guilty despite his plea that the march had been planned and ordered by his military superior, Field Marshal Kesselring, in order to sustain the morale of the local population by quelling rumours of a German military defeat.[45]

The order of a superior authority may in certain circumstances wholly or partly excuse the commission by a subordinate of an act in violation of the laws of war. While it is impossible to prescribe the exact limits within which the defence is legally justifiable the following principles should be taken into consideration by a Court confronted with the task of determining subordinate responsibility.

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[45] W.C.R., 11 (1949), p. 53.

1. The municipal law of most civilized States does not regard the plea of superior orders as constituting an absolute defence to a criminal act. Since this is a fundamental rule of criminal jurisprudence it may properly be regarded as forming part of international law.

The doctrine propounded by Professor Oppenheim in the matter of superior orders was considered by the United States Tribunal in the trial of *List and Ors.* The Court held that Professor Oppenheim espoused a minority view " which completely overlooks the fact that an illegal order is in no sense of the word a valid law which one is obliged to obey " ; that " those who hold the view that superior orders is a complete defence to an international law crime base it largely on a conflict in the articles of war promulgated by several leading nations " ; and that " international law has never approved the defensive plea of superior orders as a mandatory bar to the prosecution of war criminals ".[46]

2. While obedience to the orders of a superior officer is an indispensable element in every military system such obedience can be required only in respect of orders which are lawful. The tribunal in the trial of *List and Ors.* recognized that the foregoing rule confronted a military subordinate with the alternative of choosing between the possibility of punishment by his superior authority for disobedience of an illegal order and that of punishment for the crime under the law of nations. The Court said : " To choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character and adds nothing to the defence. We concede the serious consequences of the choice especially by an officer in the army of a dictator. But the rule becomes one of necessity, for otherwise, the opposing army would in many cases have

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[46] *Ibid.*, 8 (1949), pp. 51–52.

no protection at all against criminal excesses ordered by superiors ".[47]

3. The requirements of military discipline cannot serve to extenuate guilt when violations of the laws of war have been carried out on an extensive scale or when those offences are in flagrant disregard of generally recognized moral standards and have been committed consciously, ruthlessly, and without military excuse or justification. In considering the actions of General Jodl, the Nuremberg International Tribunal said: " Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for the commission of these crimes ".[48]

4. The evidence must establish beyond reasonable doubt that the subordinate knew, or as a person of ordinary understanding, ought to have known, that the order was unlawful. In the trial of *List and Ors.*, in defence to the charge of issuing orders for the carrying out of excessive reprisals in occupied territory by executing large numbers of hostages and reprisal prisoners at an arbitrarily fixed ratio, Field

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[47] *Ibid.*, p. 51. See also *Re von Manstein*, transcript, p. 3094: *Re Ohlendorf and Ors.*, transcript, pp. 6727–9. In evidence before the Nuremberg International Tribunal, Field Marshal von Manstein, referring to the notorious "Commissar" Order of June 6, 1941—which purported to deny to Russian political commissars the status of prisoners of war and provided for their immediate execution or, after segregation from " ordinary " Russian prisoners of war, for their summary trial or detention apart from other prisoners—said: " It was the first time I found myself involved in a conflict between my soldierly conception and my duty to obey. Actually, I ought to have obeyed, but I told myself that as a soldier I could not possibly co-operate in a thing like that, and I told the Commander of the Army Group under which I came at the time, as well as the Commander of the Armoured Group, that I would not carry out such an order which was against the honour of a soldier. In practice, the order was not carried out. My Divisional Commanders, who had already received the order independently from me in the Reich, shared my view, and, apart from that, the commissars, as good fighters, defended themselves to the last and in many cases shot themselves rather than be taken prisoner, or removed their badges of rank and could not be identified by the troops. The troops, who inwardly disliked the order intensely, certainly did not look for commissars amongst the prisoners. . . . Actually, military obedience is, of course, unconditional and absolute, but during wars there have always been cases where higher military leaders did not obey an order or carried it out differently. That is part of the higher responsibility which a high military leader bears ".

[48] *Proceedings* (H.M.S.O. paper edition), Part 21, pp. 50–51. Judgment (H.M.S.O. Cmd. 6964), p. 118.

Marshal List pleaded a basic order issued by the German High Command. The Court said: "An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly a field marshal of the German army with more than forty years' experience as a professional soldier knew or ought to have known of its criminal nature".[49] The tribunal in the trial of *Ohlendorf and Ors.* held that while it is axiomatic that a soldier's first duty is to obey, he has the power to reason and is not expected to respond like a piece of machinery.[50] In the first place, an order to require obedience must relate to military duty; secondly, even if the order relates to a military subject it must be one which the superior is, under the circumstances, authorized to give; thirdly, if the order relates to an act which is manifestly outside the scope of the superior's authority the subordinate may not plead ignorance of the illegality of the order. However, as the tribunal in the trial of *von Leeb and Ors.* pointed out: "It is an essential characteristic of military discipline that orders are issued to be carried out . . . and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Within certain limitations he has the right to assume that the orders of his superiors and of the State which he serves and which are issued to him are in conformity with international law.[51] . . . Certain orders of the Wehrmacht and of the German army were obviously criminal. No legal opinion was necessary to determine the illegality of such orders. By any standard of civilized nations they were contrary to the customs of war and accepted standard of humanity. Any commanding officer of normal intelligence must see and understand their criminal nature. Any participation in implementing such orders, tacit or otherwise, any silent acquiescence in their enforcement by his subordinates, constitutes a criminal act on his part ".[52] In the *Peleus Trial* it was established that several members of the crew of a German submarine, acting under the orders of their Commander, Eck, had fired upon and killed most of the survivors of a torpedoed Allied merchant-vessel, the *Peleus*, when the latter were either still in the water or were clinging to rafts and floating wreckage. In his summing-up the Judge Advocate said: " Is it not fairly obvious that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was not a lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders? ".[53] Thus, knowledge of the unlawful nature of an order may often be inferred. Officers and soldiers are expected to realize that acts such as the killing[54] and ill-treatment of prisoners of war, the mass extermination of civilian inhabitants of occupied territories, and the wanton devastation and pillage of property in such areas are manifestly unlawful.

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[49] Transcript, p. 10476.

[50] Transcript, pp. 6727–9.

[51] W.C.R., 12 (1949), pp. 73–74.

5. The subordinate may be aware that the order was unlawful and yet successfully plead the defence if he was subjected by his superior to such a degree of coercion as to deprive him of the will or capacity to resist the execution of the order. Nevertheless, the gravity of the act perpetrated by the subordinate must bear some relation to the

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[52] Transcript, p. 10066.

[53] W.C.R., 1 (1947), p. 12.

[54] In *Re Wielen and Ors.*, W.C.R., 11 (1949), p. 31, the accused Wielen, who was in charge of the Regional Headquarters of the German Criminal Police (*Kripo*) in Breslau, and the seventeen other accused, all of whom were officers or subordinate members of the staffs of six Regional Headquarters of the Secret Police (*Gestapo*), were found guilty of participation in the execution in March and April, 1944, of fifty officers of the British and other Allied air forces who had escaped from the prisoner of war camp at Sagan, Silesia, and who had subsequently been recaptured. In *Re Thiele and Steinert*, W.C.R., 3 (1948), p. 56, the two accused, a lieutenant and a private respectively in the German army, were held guilty of unlawfully executing an American officer who had been taken prisoner of war. See also *Re Bury and Hafner*, W.C.R., 3 (1948), p. 62.

consequences likely to follow upon disobedience of the order. While the term "superior" usually refers to superiority in rank or in authority to exact obedience, it has been held to include superiority in moral or physical capacity and power to compel the performance of an act.[55] In the trial of *Sadaichi and Ors.*, for example, the British Court in passing sentence upon Sadaichi, who had been in charge of a prisoner of war camp, pointed out that it had taken a merciful view, grave as was the crime, inasmuch as the accused was led to acquiesce by his more powerful adjutant.[56]

6. The unlawful act of a subordinate may be excused if it was carried out in obedience to a superior order represented as a measure of reprisal against similar reprehensible conduct on the part of the adversary. However, the act must not, in regard to the violation of international law committed by the enemy, be disproportionate or unreasonable.[57] This rule underlay the decision of the German Imperial Supreme Court in the *Dover Castle* (1921).[58] The Court held that the accused, a submarine commander, was entitled to consider on the information supplied to him by his superior authorities, the German Admiralty, that an order to sink enemy hospital ships was a legitimate reprisal against the abuse of similar vessels by the enemy in violation of The Hague Convention No. X of 1907. It has been maintained[59] that "we may attribute to the accused a rudimentary knowledge of the law and an elementary standard of morality, but it may be more difficult to expect him to be in possession of the necessary information to enable him to judge the lawfulness of the retaliatory measures in question in relation to the circumstances alleged to have given

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[55] *Re Ohlendorf and Ors.*, transcript, pp. 6741–2. The Court said: "It could easily happen in an illegal enterprise that the captain guides the major in which case the captain could not be heard to plead superior orders in defence of his crime".

[56] W.C.R., 15 (1949), p. 175.

[57] See, for instance, *Re Kesselring*, W.C.R., 8 (1949), p. 9; *Re von Mackensen and Maelzer*, *ibid.*, p. 1. No judgments were delivered in these trials but having regard to the evidence and to the summing-up of the Judge Advocate it is reasonable to infer that reprisals involving the execution of innocent hostages which were carried out by order of the accused were held to be excessive.

[58] *Annual Digest*, 1923–1924, Case No. 231.

[59] Lauterpacht in *B.Y.*, 21 (1944), p. 76. See also Oppenheim, *op. cit.*, vol. ii, p. 453.

rise to them ". The Order of Hitler of October 18, 1942[60] (the so-called " Commando " Order), constituted a notorious example of an order which purported on its face to be given in retaliation against the employment by the Allies of methods of warfare prohibited by the Geneva (Prisoners of War) Convention of 1929. The Order laid down in paragraph 3 that " all enemy troops encountered by German troops during so-called commando operations in Europe or in Africa, though they appear to be soldiers in uniform or demolition groups, armed or unarmed, are to be exterminated to the last man, either in combat or in pursuit ", and that " if such men appear to be about to surrender, no quarter should be given them on general principle ".[61] It is clear that such Order was manifestly contrary to established principles of international law and humanity.[62]

7. Superior orders may in certain circumstances operate in extenuation of responsibility. In the trial of *Greifelt and Ors.* the accused, most of whom were high-ranking officers in the German Security Service, were convicted of having perpetrated widespread atrocities in eastern occupied territories. Nevertheless, the Court regarded as a mitigating circumstance the fact that all the accused were answerable to Himmler.[63] Courts have also taken into consideration

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[60] For the text of this Order see W.C.R., 1 (1947), pp. 33–34.

[61] Paragraph 6 of the Order stated: " I will summon before the tribunal of war all leaders and officers who fail to carry out these instructions—either by failure to inform their men or by their disobedience of this order in action ".

[62] Article 23 of The Hague Regulations provides that " it is particularly forbidden to kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion ", and " to declare that no quarter shall be given ". The " Commando " Order was pleaded by the defence in the trial of General Dostler, Commander of the 75th German Army Corps in Italy. The accused was found guilty by a United States Military Commission of having ordered the summary execution of fifteen American prisoners of war belonging to a reconnaissance battalion who, on the night of March 22, 1944, landed on the Italian coast two hundred and fifty miles behind the front line with the intention of demolishing the tunnel on the main railway line between La Spezia and Genoa. As no judgment was delivered it can only be inferred that the Court did not accept the contention of Dostler that he was justified in believing the Order, as a Reprisal Order, to be lawful. However, it should be observed that the accused had in fact exceeded the terms of the Order itself by having the prisoners executed instead of handing them over to the German Security Service in accordance with the provisions of paragraph 4 of the Order.

[63] W.C.R., 13 (1949), pp. 68–69.

the fact that an accused took steps to impede, modify, or avoid the execution of the order. Thus the Nuremberg International Tribunal regarded as mitigating circumstances the attempt of the accused von Neurath to resign his office and the steps taken by Speer to prevent the execution of orders of Hitler involving wanton destruction of property in eastern occupied territories.[64] In the trial of *List and Ors.*, one of the accused, Dehner, a Corps Commander, was charged with responsibility for the unlawful killing of hostages and reprisal prisoners. The Court held, however, that much could be said in mitigation of punishment: " Superior orders existed which directed the policy to be pursued in dealing with the killing of hostages and reprisal prisoners. Such superior orders were known by his subordinate Commanders, a situation that made it difficult for him to act. That the defendant recognized certain injustices and irregularities and attempted to correct them is evident from the record. . . . Such examples of conscientious efforts to comply with correct procedure warrant mitigation of the punishment ".[65] In the trial of *Willy Zuehlke* the accused, a non-commissioned officer in the German Security Service responsible for guarding two prison camps in Holland, was charged with the unlawful imprisonment and physical ill-treatment of persons detained in the camps. The Dutch Court regarded as a mitigating circumstance the fact that the arrest and detention of the prisoners " did not originate with the accused " ; that he had " stupidly allowed himself to be carried along with the criminal stream of German terrorism, rather than having acted with intent on his own initiative " ; and that the accused had behaved in that way " rather on account of his rough nature than by the desire to attack his victims ".[66]

I have tried to indicate very briefly what appear to be the broad principles of law applicable to the question of superior orders in relation to the punishment of war crimes. Notwithstanding the provisions of the Charters of the two International Military Tribunals and of Control Council Law No. 10 it would appear that the order of a superior authority may, in certain circumstances, constitute a complete or partial defence as well as a factor to be taken into consideration in mitigation of punishment. The problem, as Professor Lauterpacht has pointed out, remains primarily that of attempting to achieve a balance " between the dictates of absolute discipline and efficiency in what is essentially an instrumentality of power and the equally inescapable subjection of that instrument of power to the authority of the law ".[67]

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[64] Judgment (H.M.S.O. Cmd. 6964), pp. 124, 126.

[65] W.C.R., 8 (1949), pp. 74–75.

[66] *Ibid.*, 14 (1949), p. 141. See also *Re Gerbsch*, *ibid.*, 13 (1949), p. 132; *Re Sadaichi and Ors.*, *ibid.*, 15 (1949), p. 159.

High-ranking officers in the armed forces have been apprehensive lest any attempt to saddle the subordinate with legal responsibility, however limited, for the consequences of an act performed in the discharge of a superior command should lead to the breakdown of military discipline. Several contemporary writers, including Professor Kelsen,[68] have supported the doctrine of subordinate immunity on this ground. In a debate on the subject in the House of Lords [69] the Earl of Cork properly asserted that " obedience to orders is the keystone of all military activity ". To plan and execute successfully military operations a commander must have complete confidence that his orders will be carefully observed and carried out by subordinates. In addition, mutual trust must exist between all ranks of the military organization so that each member can rely upon his comrades fulfilling their duty without hesitation. Any relaxation of discipline to the point where a subordinate could indulge at will in forensic disputation with his superior would certainly not be conducive to success in arms. Moreover, history has recorded that excesses have frequently been committed by troops as a result of indiscipline.

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[67] *B.Y.*, 21 (1944), p. 71.

[68] *Peace through Law* (1944), pp. 104–107. See also Wheaton, *International Law* (7th ed., by Berriedale Keith, 1944), vol. ii, p. 586–587; Schick, *op. cit.*, p. 47; Cohn in *Grotius Society*, 26 (1940), p. 144; Eagleton in *A.J.*, 37 (1943), p. 497.

[69] *Parliamentary Debates, House of Lords*, vol. 168, number 46, July 19, 1950.

On the other hand, it would also be fatal to military discipline if a subordinate was bound to obey without question every command of his superior. For, as Mr. Justice Stephens pointed out seventy years ago, it would lead to the absurd conclusion that a soldier was justified in "shooting the colonel on the orders of his captain, or in deserting to the enemy on the field of battle on the orders of his immediate superior".[70] The Lord Chancellor in the House of Lords debate said: "I do not believe that any soldier or sailor, by putting on a uniform and obeying orders, completely dissociates himself from all his responsibility as a citizen and as a human being".

While certain broad principles applicable to subordinate responsibility can usefully be formulated it would nevertheless be inexpedient at the present time, as the recent discussions of the International Law Commission have shown, to attempt to lay down precise and detailed rules which are unlikely to be respected in practice. As Hall once said: "It would be very unwise of an international lawyer to indulge in the delusion, with which he is often credited, that formulas are stronger than passions".[71] The situations in which the question of superior orders might arise are so diverse that no useful purpose would be served by trying to legislate for them individually. It is perhaps significant that the draft convention on genocide prepared in 1947 by the Secretary-General of the United Nations originally contained an article to the effect that "command of the law or superior orders shall not justify genocide". Even this provision was later excluded by the *ad hoc* committee appointed by the Economic and Social Council. When re-introduced as an amendment by the Soviet delegation during the discussion of the draft convention in the

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[70] *History of the Criminal Law of England* (1883), vol. 1, pp. 205–206. This principle also seems to have been approved by Dr. Freisler, President of the German People's Court for the trial of those persons who took part in the attempt on Hitler's life on July 20, 1944. The Judge appears to have stated that a subordinate would not have been justified in obeying the order of a superior officer to assist in the attempt to assassinate Hitler: *Proceedings of the Nuremberg International Tribunal*, Part 19, p. 153.

[71] Preface to *International Law* (3rd ed., 1890).

Sixth (Legal) Committee of the General Assembly it was rejected on the grounds that such a rule would be too rigid; and that it could not be reconciled with the principles of criminal law obtaining in several countries.[72]

Furthermore, there are numerous practices of modern warfare in respect of which no rule of law has been established or, at any rate, the law is disputed. A soldier cannot be expected to carry in his knapsack not only a Field Marshal's baton but also a treatise on international law. Courts are therefore almost certain to view with leniency acts committed by members of the armed forces which are not obviously unlawful or morally reprehensible.

Due weight must be attached to the circumstances surrounding the order. A clear distinction should be drawn between orders carried out in the stress and emotional excitement of battle, when instantaneous obedience is often vital to the success of the operation and to the safety of the unit and, for example, orders which may be performed at greater leisure during the belligerent occupation of enemy territory. The degree of latitude granted in the respect of the manner in which the order is to be executed and the rank of the subordinate as affecting his discretion are merely a few of the factors which a Court has to take into consideration.

A large number of the excesses to which the Second World War gave rise—especially those which bore no conceivable relationship to the necessities of war—were due to the legal and moral insensibility of the perpetrators. The cause of humanity and of the development of international law demands that licence to commit atrocities shall not indirectly be conferred upon members of the armed forces by permitting the latter to take shelter under the canopy of superior orders. It is therefore important that efforts should continue to achieve common agreement between States with regard to the principles of law in the matter so that another milestone may be planted along the tortuous road which international law has to travel.

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[72] See Report of Spiropoulos to the International Law Commission (Second Session), General, A/CN./4/25, April 26, 1950, pp. 44–45, 49.

RECENT LEADING SCOTTISH CASES

By David M. Walker, M.A., LL.B., Advocate

DIVORCE—Cruelty—Insanity—Interrelation of remedies.

An interesting short point arose in *McFarlane* v. *McFarlane*, 1951 S.L.T.(Notes) 42. A wife who already held a decree of judicial separation on the ground of cruelty sought divorce on the ground of cruelty. The husband was now confined in a mental hospital but the period of five years had not elapsed so that divorce on the ground of insanity was not yet competent. The action was dismissed as irrelevant on the ground that divorce for cruelty requires that the pursuer should still at the date of the proof require the protection of the Court: *Dunlop*, 1950 S.C. 227; 1950 S.L.T. 168; *Jamieson*, 1951 S.C. 286; 1951 S.L.T. 174. In the present circumstances, it was held, protection was already sufficiently afforded by the fact of the defender's confinement in the mental hospital. This conclusion does not seem to cover the possibility of the defender's temporary release before the quinquennium expired. In such a case, would there be no remedy open to the wife? If the defender were to be released on one or more occasions, divorce for insanity would be incompetent, yet *semble* divorce for cruelty is to be precluded by the defender's return to confinement in the mental hospital. This situation might well persist indefinitely, during which time the pursuer is being denied any remedy. It is now settled (*Dunlop*, *supra*) that the occurrence of cruelty does not give a vested right to the remedy of divorce. It now appears from *McFarlane* that even holding a decree of separation on the ground of cruelty, though possibly sufficient proof to warrant divorce (*Wilson*, 1939 S.C. 102; 1939 S.L.T. 97), does not give a vested right either. But it may be doubted whether the decision in *McFarlane* gives proper weight to the test of cruelty settled in *McDonald*, 1939 S.C. 173 at 181; 1939 S.L.T. 164 (and approved in *Dunlop*, *supra*, at p. 236 and 240)—" whether it *would be safe* for her to live with him *were she called upon*, as she has not been, to resume conjugal cohabitation ". This conception of protection from potential danger was given effect to in *McLachlan*, 1945 S.C. 382; 1945 S.L.T. 339. If the test of *McDonald, supra*, is correct then it would rather appear that the pursuer in *McFarlane* was entitled to her decree on the ground of cruelty as, until the defender had been confined continuously for five years, when the pursuer might divorce him for insanity, he might be released, and could then call on the pursuer to adhere (though she would not be bound to do so by virtue of the decree of separation).

JUSTICIARY—Juvenile offenders—Explanation of charge.

Nicol v. *Brown*, 1951 S.L.T. 298, emphasises the great care which must be taken when dealing with juvenile offenders. A boy of thirteen was charged with discharging a loaded airgun in a reckless manner and injuring another boy. When the complaint was read to the boy he was asked if he had " done it " to which he assented. It was held that this was ambiguous and an inadequate discharge of the Sheriff's duties of explanation of the complaint and inquiry under the Juvenile Courts (Procedure) Rules, and the conviction was accordingly suspended. Hence it seems that a proper discharge of the duty of explanation and inquiry involves not only simple explanation of the acts libelled and of the modus which renders them criminal but also inquiry whether the young person admits (a) doing the acts, (b) having the *mens rea* or disregard of consequences which renders them criminal, and probably (c) whether he has any alternative explanations, such as accident, to offer.

NOBILE OFFICIUM—Alimentary liferent—To what extent assignable.

In *Coles, Petitioner*, 1951 S.L.T. 308, a wife sought the authority of the *nobile officium* to assign part of her alimentary liferent in exchange for a capital sum. The Court refused to sanction and approve the assignation in view of the need to protect the interests of possible future creditors in the alimentary liferent *quoad excessum*, and also in view of the impossibility of deciding *a priori* how far an alimentary liferent income would exceed the necessary alimentary minimum at any time in the future. Moreover, the result of granting such an application would be to convert an alimentary liferent *pro tanto* into a right to capital the enjoyment of which was never contemplated by the trust.

JUSTICIARY—Statutory offences—Discretion of Court.

Kirkland v. *Cairns*, 1951 J.C. 61; 1951 S.L.T. 324, is interesting for the reiteration by the Lord Justice-General of the fact that there are in force today " innumerable administrative regulations, many of them unfortunately contained in statutes which are long out of date and which are unrelated to modern conditions, the literal and universal enforcement of which would today produce chaos and confusion, and the only safeguard against that consequence must be the good sense of the prosecutor, and still more, the good sense of the Court before whom the prosecution is brought ". This underlines the necessity of proceeding with the revision and consolidation of the statute law and one hopes that conditions of crisis will not divert Parliament from continuing to devote attention to this topic. But such a statement may not be taken as a licence to revive the doctrine of desuetude of statutes nor as a convenient means of being rid of awkward prohibitions. It is, however, well that inferior Courts and officers should be reminded that the enforcement of antiquated statutory prohibitions must be tempered with common sense.

PUBLIC AUTHORITIES—Statutory limitations on liability.

Public authorities have come very much into the legal limelight since the war and the limitations on their liability for damages continue to be expounded. *McGinty* v. *Glasgow Victoria Hospitals Management Board*, 1951 S.C. 200; 1951 S.L.T. 92, decided (although the *ratio* is not clear) that the protection conferred on a Hospital Board by section 166 of the Public Health (Scotland) Act, 1897, as applied by section 70 of the National Health Service (Scotland) Act, 1947, against claims of damages for anything done in the *bona fide* execution of the latter Act did not shield them from a claim of damages *ex delicto* based on common law negligence and also breach of statutory duty. Now in *Walker* v. *Greenock and District Combination Hospital Board*, 1951 S.L.T. 329, it has been held that a breach of contract is not something done in the *bona fide* execution of the Act. Hence a Board may be liable in damages for breach of contract. It was pointed out also that the original purpose of section 166 was to limit the time within which actions might be raised and not to act as a complete bar to such actions.

Despite these decisions and certain earlier and contradictory Outer House decisions, the extent of the protection enjoyed by Hospital Boards under the statutes is by no means clear and the matter will soon require to be authoritatively determined. The Legislature might well at the same time consider the general question of time-limits for actions against public bodies in Scotland which, as has been pointed out elsewhere (1951 S.L.T.(News) 29), is neither consistent nor clear.

RECENT LEADING ENGLISH CASES

By ANDREW RANKIN, Barrister-at-Law, and of the Northern Circuit

FACTORY—Sale of Dangerous Machinery—Lack of effective guard—Liability of seller to injured workman—Factories Act, 1937, s. 17 (2).

In *Biddle* v. *Truvox Engineering Co., Ltd., and Others* [1951] 2 All E.R. 835, Finnemore J. was called upon to determine the scope of section 17 (2) of the Factories Act, 1937. In that case a manufacturer sold to the occupier of a factory a machine containing toothed gearing not completely encased as required by section 17 (1) of the Act of 1937. In consequence of this lack of casing the plaintiff was injured. In an action against his employers they brought in the manufacturer as a third party, claiming contribution towards the damages on the ground that the plaintiff's injuries were attributable to the breach of the manufacturer's duty under section 17 (2) not to sell the machine with the parts not encased.

As the learned judge said, the real question in this case was, Were the manufacturers liable to a fine of £100 only, or were they also liable to be sued in an action for damages by a workman? Before the plaintiff could succeed in this case he had to show that the manufacturers owed him a duty, but in this case the statute provided a penalty for a breach of section 17 (1) of the Act, and the general principle that if a statute is passed which forbids an act and provides a penalty for doing it there does not arise in persons who may be affected thereby a right to pursue a civil action for damages, came into play. It was argued for the employers that section 17 (2) introduced something novel in factory legislation and that it brought in for the first time the manufacturer or seller of a machine which did not comply with the Factories Act, 1937. It was further argued that an employer was liable in a civil action even though he might also be liable for a penalty in criminal proceedings, and that the position of employer and manufacturer or seller was analogous.

In *Badham* v. *Lambs, Ltd.* [1946] K.B. 45, the plaintiff put his claim against the defendants on a breach of statutory duty under the Road Traffic Acts, 1930 and 1934, in that they had sold a car with defective brakes for which they were liable to a penalty of £20. The plaintiff's claim failed, because, in the opinion of du Parcq L.J. (as he then was), there was no indication that the legislature had any idea of protecting a purchaser who bought the car so as to give him a right of action for damages. In the instant case Finnemore J. took the same view with regard to section 17 (2) and came to the conclusion that in that section "Parliament were intending only to prevent unfenced machinery getting into factories. No doubt, in an attempt to make accidents of this sort less likely, they decided to bring in the manufacturer, but, in my opinion, they were satisfied to say that, if he committed an offence, he should be liable to a fine up to the amount of £100."

LANDLORD AND TENANT —Standard Rent —Onus on landlord to prove standard rent.

In 1949 a flat was let at a weekly rent of 35s. to a tenant who, after the tenancy was determined, brought proceedings against the landlord claiming that she had paid excessive rent as the standard rent was only 22s. 6d. a week. The tenant proved that the latter rent had been paid by a tenant from 1944 to 1945 and by another tenant from 1946 to 1949, subject only to an increase to 23s. 6d. a week by reason of an increase in rates.

The county court judge refused to accept 22s. 6d. as the standard rent holding that the onus was on the tenant to prove she had paid rent in excess of the standard rent, and that as she had failed to call evidence sufficient to enable him to determine the standard rent she had not discharged that onus. It was argued for the landlord before the Court of Appeal in *Keane* v. *Clarke* [1951] 2 K.B. 732, that the tenant failed to prove that the letting in 1944 was the first letting after September 1, 1939, but the court refused to accept that there was any such onus of proof on the tenant. In doing so Evershed M.R. held that *Veale* v. *Cabezas* [1921] W.N. 31, supported his view that in the absence of evidence of previous lettings an inference can be drawn as to the figure of the standard rent from evidence of a later letting. In holding this view the learned judge pointed out that it did not absolve the tenant from the initial onus of proof but held that she had discharged it and had established a prima facie case.

Denning L.J. pointed out, as further support for the view of the court, that "ever since 1938 it has been the duty of a landlord, in the case of a house within the Rent Restriction Acts, to provide a rent-book, and to insert in that rent-book a statement of what the standard rent is. That shows that it is the duty of the landlord to find out what the standard rent is, and to tell it to the tenant."

SALE OF GOODS—Warranty—Sale by auction—Oral assurance by vendor—Printed conditions of sale excluding any warranty not in writing—Right of buyer to damages.

In *Harling* v. *Eddy* [1951] 2 K.B. 739, the defendant put up a heifer for sale by auction. The printed conditions of sale provided that no article was sold with a warranty unless the warranty was in writing. There was no bid for the heifer when she appeared in the auction ring, and the defendant then stated that there was nothing wrong with her and he would take her back if she turned out not to be as he said she was. Bidding thereupon started and the heifer was knocked down to the plaintiff. The heifer's condition at once proved unsatisfactory, and some three months later the plaintiff wrote to the defendant to take it back. The defendant did not reply and one month later the heifer died of advanced tuberculosis.

Evershed M.R. held that the defendant's statement was a condition and not a mere warranty. Accordingly, the printed conditions of sale had no application to the facts of the case. As there had been a rejection within a reasonable time that was sufficient to decide the matter in favour of the plaintiff. The learned judge proceeded, however, to express his views on the situation if the statement was a warranty merely and said that the question to be answered was, Did the defendant imply by his statement that the animal should be sold on the faith of what he stated, to the exclusion of the printed conditions? On the facts of the case he held that the question must be answered in the affirmative and that the plaintiff must also succeed if the statement was to be regarded as a warranty merely. In his concurring judgment Denning L.J. stated the principle underlying the case before him thus: "If a person wishes to exempt himself from a liability which the common law imposes on him, he can only do it by an express stipulation brought home to the party affected and assented to by him as part of the contract. The party who is liable at law cannot escape liability by simply putting up a printed notice, or issuing a printed catalogue, containing exempting conditions. He must go further and show affirmatively that it is a contractual document and accepted as such by the party affected."

RECENT PRIVY COUNCIL CASES

REVENUE: "assessable personal property".

Bennett and White (Calgary), Ltd. v. *Municipal District of Sugar City (No. 5)* [1951] A.C. 786, was an appeal against the judgment of the Supreme Court of Canada, reversing the judgment of the Appellate Division of the Supreme Court of Alberta affirming the decision of Mr. Justice Shepherd. The appellants were a company incorporated under the Companies Act of the Province of Alberta, and the respondents were a municipal district in that Province. The Supreme Court of Alberta declared that the assessment of the appellants for personal property made by the respondents for the year 1947 was invalid and should be quashed and set aside.

In 1946 the Dominion Government were carrying out in the Province of Alberta a large irrigation scheme which included, in the respondents' municipal district, the construction of diversion and irrigation tunnels for which the Minister of Agriculture, on behalf of the Crown, entered into a contract with the appellants. The work was to be completed by April, 1948. The appellants were bound to provide the plant and equipment necessary for carrying out the contract. They did provide, at the site of the works, a large variety of plant and equipment, which remained there during 1947. The respondents were authorized to make assessments and levy taxes in respect of personal property in their district. Their assessor visited the site of the appellants' works and made a detailed valuation of those parts of the plant and equipment which the appellants had brought there, and which he thought were taxable under the Assessment Act and the Municipal Districts Act of the Province (which Acts, by section 3 of the Assessment Act, are to be read together) as personal property. By section 4 of the Assessment Act: "All property and every interest therein in a municipality which is subject or liable to taxation by an Act of the Province, save and except only such property as is declared by this Act to be exempt, shall be liable to assessment and taxation by the municipality". Section 5 contained the exemptions, the material ones being:

" (*o*) Every right, title and interest of His Majesty in any property whatsoever; and . . . (*z*) All motor vehicles ".

The appellants lodged a complaint against the assessment. It came before the Court of Revision which slightly increased the amount. The appellants appealed to the Alberta Assessment Commission contending, *inter alia*, that the personal property the subject of the assessment was the property of His Majesty in the right of the Dominion of Canada, and that the appellants could not therefore be assessed in respect of it; and that the assessment contained a considerable number of motor vehicles which were exempt from taxation. The Commission decided that the appellants had been rightly assessed, but reduced the amount. The respondents then demanded a sum as tax in respect of the assessment, and the appellants brought the present action.

The provision in the contract on which the appellants chiefly relied in contending that the property assessed was the property of His Majesty was clause 15, which stated: " All machinery, tools, plant, materials, equipment, articles and things whatsoever provided by the contractor or by the engineer . . . and not rejected . . . shall from the time of their being so provided become and until the final completion of the said work shall be the property of His Majesty for the purposes of the said works. . . . Upon the completion of the works . . . such of the said machinery, tools, plant, materials, equipment, articles and things as shall not have been used and converted in the works or disposed of by His Majesty under powers conferred in this contract shall upon demand be delivered up to the contractor in such condition as they may then be in ".

Relying on that clause the appellants, in their statement of claim, contended that they had been wrongfully and illegally assessed because the personal property in respect of which the assessment was made was at all relevant times the property of His Majesty and that they could not be in law assessed or placed on the tax roll in relation thereto. Alternatively, the appellants relied on the exception of motor vehicles in section 5 (*z*) of the Assessment Act and contended that certain types of vehicles specified were motor vehicles within the meaning of that exception and were exempt from taxation. The respondents in their defence and counterclaim contended that the decision of the Alberta Assessment Commission against the appellants was a final decision and that the appellants were precluded by it from taking exception to the assessment and taxation of which they complained. The respondents further sought a declaration that the appellants were liable to the assessment and taxation.

On the issue of *res judicata*, which raised a question of jurisdiction, the Board held that the effect of *Toronto Ry.* v. *Toronto Corporation* ([1904] A.C. 809), *City of Victoria* v. *Bishop of Vancouver Island* ([1921] 2 A.C. 384), *Donohue* v. *St. Etienne de la Malbaie* ([1924] S.C.R. 511), *Hagersville* v. *Hambleton* ((1927) 61 O.R. 327), *Sifton* v. *City of Toronto* ([1929] S.C.R. 484) and *City of Ottawa* v. *Wilson* ([1933] O.R. 21) was that a taxpayer, called on to pay a tax in respect of certain property, had a right to submit to the ordinary Courts the question whether he was taxable in respect of that property unless his right to do so had been clearly and validly taken away by some enactment, and that the fact that the statute which authorized assessment allowed an appeal or a series of appeals against assessments to other tribunals was not sufficient to deprive the taxpayer of that right. An unsuccessful complaint to the Court of Revision did not prevent the person aggrieved from later raising in Court the question whether he was taxable, and the decision of the Court of Revision was not *res judicata.*

On the question whether or not the assessment was, on its merits, valid or not, the Board held that the Crown was at all material times the owner, within the meaning of section 26 (1) (*l*) of the Assessment Act—which provided that the assessment roll should contain the name of the person who was the " owner " or the person who was " in legal possession " of assessable personal property, or the names of both such persons—of the chattels in question. The true position was that, while the delivery on the Crown site was a delivery to the Crown and vested the ownership in the Crown, there was a notional bailment or redelivery of possession to the appellants for the purpose of carrying out the building contract. Therefore, in the absence of other considerations, the appellants might be judged to have been validly assessed as persons in legal possession. But as the assessment consisted of a single undivided sum in respect of the totality of property treated as assessable, and when one component (the motor vehicles, not dismissible as *de minimis*), was on any view not assessable and wrongly included, by reason of section 5 (2) of the Assessment Act, the assessment was wholly bad.

The Board further held that, even if motor vehicles had not been included in the assessment, it would still have been invalid. By section 125 of the British North America Act, 1857, no property belonging to Canada or to any Province was to be liable to taxation. The Board stated that only personal property was involved; that there was no express provision that the subject was to be liable to any extent in respect of Crown Property, or that the exemption accorded to such property was not to extend to the subject who might have some interest therein (contrast *City of Montreal* v. *Att.-Gen. for Canada*); that all that was said was that (without specific reference to Crown property) the subject was to be liable where in legal possession; that that left it open to doubt whether " person in possession " covered a person in possession of Crown property. Where the terms and scope of incidence of such a provision were in any doubt they should, if possible, be construed so as not to conflict with section 125 of the British North America Act—and that accord could in the present case best be secured by reading persons " in legal possession " as limited to persons who would be taxable if owners in possession; and the Crown, who was the owner, would not have been taxable if in possession; that according to the terms of section 26 (1) (*l*) itself the person to be entered on the assessment roll was not the person in legal possession of any personal property, but the person " in legal possession of assessable personal property "; and Crown property not being taxable was *a fortiori* non-assessable.

The Board accordingly allowed the appeal and restored the judgment of the Supreme Court of Alberta.

EXPORT:
No licence.
Forfeiture.

Aboul Rachanan Tamim and Another v. *Comptroller of Customs* (*Gold Coast*) [1951] A.C. 618, was an appeal from the judgment of the West African Court of Appeal affirming a judgment of the Supreme Court of the Gold Coast which had reversed the judgment of the Court of the district magistrate, Accra, dismissing the claim of the respondent for the forfeiture of certain textile goods and the imposition of penalties. All three Courts found as a fact that the appellants were guilty of bringing certain cotton goods to a place for the purpose of export from the Gold Coast without a licence. The district magistrate dismissed the case against the appellants on a construction of the Import, Export and Customs Powers (Defence) Ordinance, 1939—which was no longer contended for by the appellants in view of the decision of the Board in *Att.-Gen. for Palestine* v. *Fakhry Ayyas* ([1947] A.C. 332) that export by land as well as by sea was prohibited.

It was contended for the appellants, first, that the magistrate had no jurisdiction to try the case, as he did, without pleadings; secondly, that the goods were not at the time of seizure being exported within the meaning of section 5 (1) (*b*) of the above Ordinance of 1939; thirdly, that, in any event, at the time of seizure the appellants had abandoned any intention of exporting the goods and that in such circumstances the seizure was illegal; and lastly that the concurrent findings of fact that the appellants intended to export the goods and were exporting them without a licence were not justified by the evidence. The Board were satisfied that there was ample evidence to support the findings of the three Courts that the appellants were engaged in exporting the goods in question without a licence, and they saw no reason to differ from those findings.

They were also satisfied that there was no substance in the appellants' other contentions. By Order 25 of the Third Schedule to the Courts Ordinance suits were ordinarily to be heard without pleadings, and by section 145 of the Customs Ordinance fines and forfeitures might be sued for, determined, enforced and recovered by suit in a magistrate's Court and the ordinary procedure was to apply to such proceedings. It was, therefore, the ordinary and regular procedure for the magistrate in the present case to try the suit against the appellants on the writ of summons without pleadings as he did, and there was nothing in section 145 (1) and (3) which made it irregular for him to do so.

It was also argued for the appellants that, in the removal of the goods from a warehouse to other premises, there was no evidence of exportation. But the Board were of opinion that, as the Courts below all took the view that the goods were moved to the other premises for the purpose of being exported, the goods were brought to that place for the purpose of being exported within the meaning of section 5 (1) (*b*) of the Ordinance of 1939, and that the appellants, who both took part in bringing them there, were exporters within the meaning of the section. Section 5 (1) (*b*) provided: "If any goods are brought to any quay, or other place, or waterborne, for the purpose of being exported or of being so carried or shipped in contravention . . . of an order under this ordinance . . . those goods shall be deemed to be prohibited goods and shall be forfeited; and the exporter . . . shall be liable, in addition to any other penalty under the enactments relating to customs, to a customs penalty of £500 ".

The Board were further of opinion that a person was liable to the prescribed penalty and to forfeiture of the goods if he took part in bringing prohibited goods to a place for the purpose of export even if before seizure of the goods he abandoned his intention to export them. No authority was cited to their Lordships that, in such a case as the present, the person intending to export prohibited goods had a *locus pœnitentiæ.* The appeal was accordingly dismissed.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, B.A., LL.B., Advocate

RE POLEMIS

The evergreen *Re Polemis* [1] appears once again in the October 1951 number of the *Modern Law Review*, where it is made the subject of an article by Lord Wright, perhaps the most authoritative extra-judicial pronouncement up to this date. Lord Wright begins by saying that he has felt a personal interest in the case for thirty years, since he argued it unsuccessfully before a Court of Appeal of great eminence, which wisely, as he now thinks, rejected the contention he then advanced. It is interesting to note that his junior was Lord Porter, who has also expressed an extra-judicial opinion in favour of the decision, although in *Bourhill* v. *Young* [2] he was careful not to commit himself one way or the other.

There are two propositions involved in *Re Polemis*. The major one was summed up shortly by Mr. Justice Holmes (who approved of the decision) in a letter to Sir Frederick Pollock (who did not) quoted by Lord Wright: " The tort once established, the tortfeasor takes the risk of consequences ". The minor proposition is that in measuring damages, once fault is established, it is those which result directly from the injury complained of which are relevant. Both propositions are concerned with the assessment of damages, which, as Lord Wright points out, is an entirely different question from that of liability. " A failure to observe the distinction between the cause of action and the measure of damages has led to confusion in the attacks of some lawyers who have criticised in general terms the authority of *Re Polemis*." Thus the case is often discussed as if it were an authority on liability in tort generally, and most of the criticisms have been on this basis. But the question of liability did not properly arise. One thing at least is clear since *Bourhill* v. *Young*,[2] namely, that the matter of damages must be kept separate from the matter of liability, and thus that in an action of reparation a double issue of remoteness is involved, first whether the injury suffered by the pursuer is too remote a consequence of the defender's failure of duty for the latter to be held liable to the pursuer at all, and secondly, whether the particular damages claimed are too remote a consequence of the injury complained of to be recoverable. All the judges in *Bourhill* v. *Young* in the House of Lords drew this distinction.

The issue therefore between those who affirm and those who deny the correctness of the major proposition of *Re Polemis* is sharply defined. It depends on whether the test of foreseeability is to be applied to liability only, or both to liability and to damages. On the one side there may be cited the words of Scrutton L.J., in *Re Polemis*: " To determine whether an act is negligent, it is relevant to determine whether any reasonable man would foresee that the act would cause damage; if he could not, the act is not negligent. But if the act could or might probably cause damage, the fact that the damage it actually causes is not the exact kind of damage one would expect is immaterial ". On the other side, Lord Russell of Killowen said, *obiter*, in *Bourhill* v. *Young*: " In considering whether a person owes to another a duty breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, *i.e.*, to the question of compensation not of culpability; but it is also relevant . . . to the question of culpability, not of compensation ".

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[1] [1921] 3 K.B. 560.

[2] [1943] A.C. 92; 1942 S.C. (H.L.) 78.

It is not open to doubt that the view of Lord Russell of Killowen represents, not the law as it is, but the law as in his opinion it should be. Lord Wright goes so far as to say: " If the rule as to the measure of damages depends on their foreseeability, that is if the plaintiff can only recover in respect of a wrong such damage as the wrongdoer could be proved or deemed to have foreseen when he committed the tort, it is clear that a great upheaval of recognised authority would be necessary, indeed a breach of authority with tradition and precedents for which statutory enactments would be necessary ". If that is so, we may add that statutory alteration of the existing law is scarcely conceivable. The main argument for the foreseeability test is that it is contrary to principle that a person should be made responsible for damages which, since he could not foresee them, are unconnected with any fault on his part. But it would be equally contrary to principle to deny the victim compensation because the particular damage sustained was of a kind which the person responsible for occasioning it could not be expected to foresee. The fundamental principle of damages is that the victim should as far as possible be placed in the same position as if the injury had not been committed, and it is irrelevant from this point of view to inquire whether the person who caused the injury in fact anticipated, or could have anticipated, the victim's loss. Where the two principles are in conflict, it is logical that the latter should prevail over the former, once it is conceded that measurement of damages and not determination of liability is the issue. The result may sometimes be inequitable, but a rule according to which the foresight, actual or notional, of the person who occasioned the injury rather than the loss of the victim was the decisive factor would produce results much more undesirable, especially since the practice of insurance is now so extensive. After all, this is not the only case where a man may be made responsible by law for certain consequences of his actions, although they may occur without fault on his part. The charterers in *Re Polemis* complained that they had to pay for the destruction of the ship, although no reasonable person could have anticipated, according to the arbitrators, that the fall of a board into the hold of the ship would have had that result. They might equally well, as a matter of equity, have complained because they were made responsible for the negligence of the stevedores employed by them.

Sir Percy Winfield is puzzled by the fact that writers of textbooks and articles, whether approving of *Re Polemis* or not, seemed to attach more importance to it than counsel or judges. The latter " did not criticise it; they simply ignored it. Until 1933 there was scarcely any mention of it in the reports ".[3] But surely the reason why *Re Polemis* was seldom mentioned was, not that practitioners ignored it, but that they took it for granted. Claims for damages are dealt with every day in accident cases on the basis of the loss sustained by the injured party, and on that basis alone, without it occurring to anyone to inquire whether the other party could have foreseen the loss. He would be an eccentric counsel who argued, where his client had run down and killed a man with a wife and half a dozen young children, that they should recover nothing because it could not reasonably be foreseen that the man was not a bachelor. Yet that is what the supporters of the foreseeability test must maintain if they are consistent. The only alternative is to attach a special meaning to the word " foresight " and treat the sentence " A can reasonably foresee that consequences X, Y and Z may result from his action " as equivalent to the sentence " A can reasonably imagine that consequences X, Y and Z might result from his action ". But this is to give " foresight " quite a different meaning from that which it bears when the question of culpability, not compensation, is being considered; and it would seem to deprive the test of foreseeability of all usefulness. For there are few consequences of any action so improbable that it would not be reasonable to imagine their occurrence.

It may, perhaps, be said that the test of foreseeability, even although it is not applicable to all consequences, may be used at least to exclude certain kinds of consequence as being too remote. Thus, while A, perhaps, cannot be expected to foresee a particular loss which B may suffer as a result of being run down, he can quite well foresee that B may suffer a loss of earning power or that any dependants he has may suffer a loss of support. Whereas A may be unable reasonably to foresee certain other types of loss which B might possibly suffer, and so should not be liable therefor in damages. Such a contention, however, practically amounts to an abandonment of the test of foreseeability, since it leaves outside the scope of foreseeability the real problem involved, which is to determine what particular loss should be treated as too remote, and what not too remote, for the purpose of assessing damages. For example, it is unhelpful to say that the stevedores in *Re Polemis* could have foreseen generally some classes of damage by the fall of the board, *e.g.*, damage to the structure of the vessel or to the cargo in various ways, but not other classes of damage. The question remains, within which class fell the particular damage that occurred, *viz.*, the destruction of the vessel by an explosion of petrol vapour caused by a spark from the falling board. Was it in the foreseeable class or not? Some other test than the actual or notional foresight of the stevedores must be invoked to answer that question. Either an occurrence can reasonably be foreseen, or it cannot. If the latter supposition is correct, then surely *ex hypothesi* foresight is irrelevant to a consideration of the situation which results from it.

Perhaps the most interesting part of Lord Wright's article is his view of the relation of damages in tort to damages in contract. It will be recollected that *Hadley* v. *Baxendale*[4] laid down that the damages payable for breach of contract are " such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself [the first rule] or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as a probable result of the breach of it [the second rule] ". It has generally been assumed that, in consequence of *Re Polemis*, a different rule applies to damages in tort, at any rate in cases of negligence,[5] although no one has been able to offer a satisfactory explanation of the reason for the distinction, or of what exactly the distinction is. The problem has been rendered more acute by the decision of the House of Lords in the *Karlshamns Case*.[6] As a result of that decision, according to Professor Goodhart, " it may now be said that damages, both in contract and in tort, are based on the doctrine of ' reasonable contemplation ' ".[7] On the other hand, Mr. Philip James, writing in the *Modern Law Review*, thinks that the *Karlshamns Case* has at last settled authoritatively the proper interpretation of the two rules in *Hadley* v. *Baxendale*. The first rule is to be contrasted with the direct consequence rule adopted for torts by *Re Polemis* as a subjective rule based upon reasonable foresight. The second rule has been resolved into an alternative method of stating the same proposition as the first rule, in its application to special circumstances.[8]

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[3] *Law of Tort* (5th ed.), p. 68.

Both these opinions, however, in so far as they are based on Lord Wright's speech in the *Karlshamns Case*, must be quite mistaken, unless Lord Wright has changed his mind since, as he does not appear to have done. For he now makes it plain that, in his view, there is no difference between the first rule in *Hadley* v. *Baxendale* and the rule in *Re Polemis*. Foresight is relevant to the second rule in *Hadley* v. *Baxendale* only, not to the first. " *Hadley's Case* only refers to contemplation as an element affecting damages in the sense of the contemplation of both parties. ' Contemplation ' of one party is as irrelevant in regard to damages in the case of negligence as in the case of any other wrong, including breach of contract."

There seems to be a difficulty here, which Lord Wright does not dispose of. If liability and measure of damages are two separate questions and foresight is only relevant to the former, how can it be said that the contemplation of both parties is more relevant than the contemplation of one party? Moreover, the judgment of the Court in *Hadley* v. *Baxendale*, after the words quoted above, goes on to state, referring to the first rule, that, if the special circumstances under which the contract was actually made were wholly unknown to the party breaking the contract, he " could only be supposed to have had in his contemplation the amount of injury which would arise generally " from such a breach of contract. Thus contemplation clearly appears to be imported into the first rule as well as the second, and the amount of damages recoverable either way depends on whether the party in breach ought to foresee general loss or special loss. What then does Lord Wright mean when he says that the contemplation of one party is irrelevant under *Hadley* v. *Baxendale*?

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[4] 9 Ex. 341.

[5] See, for instance, *Gloag on Contract* (2nd ed.), p. 697, note 1.

[6] *Monarch S.S. Co.* v. *A/B Karlshamns Oljefabriker*, [1949] A.C. 196; 1949 S.C. (H.L.) 1.

[7] (1949), 65 L.Q.R. 137.

[8] (1950) 13 M.L.R. 36 ff.

Assistance in solving the difficulties presented by a comparison of the rule in *Hadley* v. *Baxendale* with the rule in *Re Polemis* may be obtained by considering a distinction drawn by Lord Moncrieff in his opinion in the *Karlshamns Case* when it was before the Court of Session. " The injury in respect of which damages are being awarded in this case is the interruption of the voyage at a port short of the contracted port of destination. The damages claimed as having resulted from that injury include as a principal item the cost of transhipping the goods and completing the voyage. The breach of contract founded on as having caused the injury is delay in prosecution of the voyage resulting from unseaworthiness. It is essential that the first and second of these elements be distinguished and not confused."[9] He then goes on to say that the question of liability is to be answered by considering whether the breach of contract was a cause, and a sufficiently proximate cause, of the injury, the expectation of the party in breach not being relevant to this question. On the other hand as soon as liability has been established, and the subsequent question of assessing damages arises, the expectation of the party in breach is, in his opinion, of the highest relevance. " Liability depends on cause and effect alone, and is independent of probability; the measure of liability depends also on cause and effect, but is further dependent (apart from a special engagement) on the presumed expectation of the debtor." The other judges both of the First Division and of the House of Lords, while they came to the same conclusion as Lord Moncrieff, entirely disagreed with the grounds of his decision, which are, indeed, paradoxical. The distinction, however, which he draws between the three elements, (*a*) breach of contract, (*b*) resulting injury, and (*c*) measure of damages, is very valuable and, perhaps, provides the key to the problem.

The *Karlshamns Case* was concerned primarily with liability and not damages. The defenders there, the shipowners, admitted that their vessel was delayed in its voyage owing to unseaworthiness, but argued that the real cause of the loss sustained by the pursuers, a Swedish firm, was not the delay caused by the condition of the vessel but its diversion under orders of the British Government from the Swedish port of destination to Glasgow by reason of the outbreak of war in 1939. The questions mainly debated were whether the defenders foresaw, or should have foreseen, the likelihood of the outbreak of war and whether this circumstance was decisive of liability. In respect of damages, Lord Wright said in his speech, the case was singularly clear, because the contract entitled the pursuers to have the cargo delivered at the Swedish port and the damages claimed and awarded represented simply the sum necessary to effect that result. The central issue then was whether the injury (failure to deliver at the port of destination) was or was not the result of the breach of contract (delay in prosecution of the voyage), and it was decided that it was the result.

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[9] 1947 S.C. 179, at p. 195.

But the fact that the party in breach contemplated, or should have contemplated, the outbreak of war during the course of the voyage had no bearing on the measurement of damages.

It is to be observed that three elements must similarly be distinguished in a case based on negligence. Thus in *Re Polemis* there was (*a*) a breach of duty, namely, negligence in handling the cargo; (*b*) resulting injury, the destruction of the ship by fire; and (*c*) measurement of damage, the loss suffered owing to destruction of the ship. The issue, however, in that case was not the relation between (*a*) and (*b*), since it was accepted by the Court that the destruction of the ship was caused by negligence in handling the cargo, but the relation between (*b*) and (*c*).

If the three elements mentioned by Lord Moncrieff are kept separate when considering the statement of the law in *Hadley* v. *Baxendale*, it follows that the two rules of that case need to be revised. But it is thought that this does not involve much more than a variation in form. They might be re-stated, with the addition of a third rule, thus: " Where two parties have made a contract which one of them has broken, the liability of the party in breach should depend on whether any special circumstances under which the contract was actually made were communicated to him or not. In the latter case he can only be supposed to have had in contemplation such injury as would arise generally from such a breach [the first rule]. In the former case he ought to be liable for all injury which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract [the second rule]. In either event the damages recoverable should be such as may fairly and reasonably be considered as arising naturally, *i.e.*, in the ordinary course of things and irrespective of the contemplation of either, or both, of the parties, from the injury [the third rule] ". The revision is necessary because the Court in *Hadley* v. *Baxendale* was not envisaging remoteness of damage, and therefore the three elements were telescoped into two.

There still remains an apparent discrepancy between the measurement of damages in *Hadley* v. *Baxendale*, as re-stated, and the minor proposition in *Re Polemis*, that is to say that the test is whether the damages claimed are the direct result of the injury. In substance, however, there is scarcely any difference, and, indeed, it may be said that there is no practical difference at all. The important matter is that, whether the word " natural " or " direct " is preferred, the test is an objective one and has no reference to the expectation or foresight of the party in breach of contract or of duty, as the case may be. " Direct " appears to be a more precise word than " natural ", but many decisions could be cited, for example, *The Liesbosch*,[10] to show that " direct " in this context is equivalent to " reasonably direct ". It is a legal term used to distinguish consequences which Courts think relevant from those they think too remote, not a scientific conception. As is evident when, in regard to the measure of damages, he makes no distinction between contract and tort, this is the sense in which Lord Wright uses the term " direct ".

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[10] [1933] A.C. 449.

It may be open to doubt whether " direct " is the best word to denote those consequences which are not to be considered as too remote in measuring damages. But there is certainly an advantage in sticking to one word consistently rather than employing a number indifferently. Much confusion has been introduced into the subject by the ambiguity of words like " reasonable " and " probable ". Whether a particular event is probable or improbable may depend on the point of view from which it is regarded, and many results may appear to be reasonable, or likely, in the light of after-knowledge, although they could not have been reasonably foreseen. Thus, in *Re Polemis*, the arbitrators found that the stevedores could not have reasonably anticipated the causing of the fatal spark from the falling of the board into the hold of the vessel, though they might reasonably have anticipated some damage. But, looked at afterwards, in the light of the facts that the hold was full of petrol vapour and that the fall of a heavy board may easily cause a spark, there was nothing unlikely about the destruction of the vessel. In measuring damages, while reasonable foresight is irrelevant, *ex post facto*, reasonableness or probability is a factor which Courts do not, and cannot disregard.

In Scotland, *Re Polemis* has frequently been criticised, perhaps partly because some judges have not been so careful as Lord Moncrieff to distinguish the three elements involved in cases where damages are claimed on the ground of breach of contract or negligence. In any event, whatever they have professed, Courts have constantly practised the rule in *Re Polemis*. It is difficult to see how they could do otherwise, and if the measurement of damages is to depend on their foreseeability, an upheaval of authority almost as great as that which Lord Wright thinks necessary in England would be required. Both in England and in Scotland, it is noticeable that Courts have shown a marked disinclination to offer an opinion in direct terms on this vexed subject. For that reason some not very well considered *obiter dicta* have attracted too much attention, such as that of Lord Kinloch in *Allan* v. *Barclay*,[11] where he said that only such damages can be claimed " as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer ". The second part of this sentence is in complete *non-sequitur*.

Periodicals also received: *The Law Journal*, *Revista Jurídica de la Universidad de Puerto Rico*, *Informacion Jurídica* (*Madrid*), *New York University Law Review*, *The Medico-Legal Journal*, *The Law Quarterly Review*, *La Justicia* (*Mexico*), *Journal of Comparative Legislation and International Law*, *Revista del Foro* (*Lima*), *Canadian Bar Review*, *Western Political Quarterly*, *Oklahoma Law Review*.

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[11] 1864 2 M. 873 at 874.

RECENT LITERATURE

Acta Dominorum Concilii et Sessionis, 1532–33. Edited by Ian H. Shearer, M.A., LL.B. Advocate. 1951. Edinburgh: The Stair Society. Vol. XIV.

The Stair Society published in 1943 as their Eighth Volume the *Acta Dominorum Concilii*, 1501–3, and now in their Fourteenth Volume they have presented to their members Selected cases from the *Acta Dominorum Concilii et Sessionis* covering the period from the inception of the Court of Session on May 27, 1532, to July 5, 1533—in short, the first decisions of the Court of Session. The volume has been edited by Mr. Ian H. Shearer, LL.B., Advocate.

The Court began to function in difficult days. As the Introduction says " Scotland had not recovered from Flodden, the young King was but emerging from a troubled minority, there was running war on the Borders and the great Lords, although as a class perhaps past the peak of their power, were in their factions and ambitions a continual threat to State sovereignty ".

There are 116 cases in the volume and some of these reflect the troublous times of the period. The range of subjects covered is wide and includes questions of the jurisdiction of the new Court in relation to the Ecclesiastical and other Courts, actions of spuilzie, assythment, theft and deforcement, suspensions, advocations and reductions, questions in regard to heritable property and leases and actions of interdict. There are one or two mercantile cases and actions by foreigners. In several cases submissions are made to the Lords as arbiters. It is interesting to notice the Court considering itself competent to take questions about heritage, thus showing that *Forbes* v. *Weemes* in 1542 was merely declaring what was an existing situation. The Court, too, is seen as resolved to uphold the civil against the ecclesiastical power but without interfering with the recognized areas of spiritual jurisdiction. Case No. 101 is interesting as an example of the Lords using their powers legislatively, for by Act of Sederunt of July 16, 1532, the " Lordis be sentence interlocutor decernis that a ——— ——— of landis may be previt by witness ". This principle has been treated by all the writers as one of common law.

In his Introduction, which is disappointingly short, Mr. Shearer gives the Sederunt of the Court at its first sitting and the original statutes and rules of the Court and he goes on to deal with the Jurisdiction of the Lords as shown by the cases. He points out that litigants obviously from their protests for or threats of " remeid " thought that they could appeal from the Court to Parliament to investigate and correct wrongous or incompetent processes.

There is frequent reference in the cases to practick in the sense of rules formulated and accepted in practice and Mr. Shearer thinks that Craig's view, that practick in the sense of custom was then secondary only to statute law, must receive respect and consideration.

Of the 116 cases, 80 are cited by Balfour in his *Practicks* or illustrate his propositions drawn from them and other cases. Balfour's work, says Mr. Shearer, was the outcome of a desire then current for codification of the law and the central authority may have wished a statement of the rules of law then existing without any explanations.

Each case has been given a rubric and has been accompanied by very useful and interesting notes, which deal not only with the points of law and legal practice, but also with the historical, social and genealogical aspects of each case. For these latter topics Mr. Shearer's father, Mr. Andrew Shearer (formerly town clerk of Dunfermline), has been mainly responsible. The book concludes with a bibliography and indices of persons, places and subjects.

The Stair Society is to be complimented on having given to its members the first Acta of the Court of Session in such readable form, and having added to the literature of the history of Scots law this important work, and thanks are due to Mr. Shearer and his father for all their work on this volume.

Trust Law and Accounts. By John B. Wardhaugh, C.A. 1951. Edinburgh: W. Green & Son, Ltd. Price 27s. 6d. net.

The question is often asked why must we have these complicated trust accounts which even the experienced often find difficult to prepare and are often quite unintelligible to those who have to read them. Most clients indeed sign them in the spirit of the granting of a vote of confidence rather than of intelligent agreement. The answer broadly is that such accounts seek to do at least two things at once—to provide a detailed record of transactions over a given period and to apportion the consequences of these transactions amongst the different interests concerned. Some have sought to simplify trust accounts by producing a statement of receipts and payments grouped under different headings such as rents, interests, feuduties, rates, etc. — in effect a rearranged or classified cash account. But one does not have to go very far to find that this is by no means enough. Indeed, it is as well to recognise that trust accounts, however much they can be abbreviated (and there is often much scope for this), can never be fundamentally simple, for all trusts necessary involve more than one interest, and some comprise many more. Every transaction therefore raises a question of apportionment between one or more interests and it is necessary to modify the cash account into a form of account in which such apportionments can be reflected.

The preparation of a testamentary trust account calls therefore for two very distinct qualities—exact legal knowledge over a wide field, and the ability to express that knowledge in accounting language.

It has been said that a gentleman-farmer is never quite the one thing or the other, and the same may be true of the lawyer-accountant. Certain it is that most lawyers lack knowledge and experience in accounting technique. Yet the lawyer turned accountant has a decidedly easier task than the accountant turned lawyer, for he has after all only to master the limited number of trust account forms and methods in use which change but little with the passing of the years.

An accountant on the other hand, has to embark upon an ocean of legal knowledge with which he is not in daily touch, he has not the fund of experience in the thousand and one legal points which can crop up and he is even less likely than the average lawyer to be able to keep himself abreast of changes in the law not just of trusts but in all those other fields of law which affect property rights.

In *Wardhaugh on Trust Law and Accounts*, which now appears in its Fourth Edition, the practitioner will find a really practical guide in the technique of drawing trust accounts and in dealing with the numerous accounting problems that arise. At the same time he is provided with a mine of information on the numerous points of law involved.

For those not already familiar with the work which many accountants and lawyers have regarded as their Bible in this subject for nearly half a century, it may be mentioned that it falls broadly into four sections dealing with (a) the constitution of trusts to powers and duties of trustees and a description of ordinary trust machinery, (b) the distribution of the estate within the framework of the trust deed including where applicable the settlement of legal rights, legacies and estate duty, (c) the preparation of trust accounts with detailed practical examples, and (d) the preparation of judicial factory accounts with model accounts worked out and a statement of powers, duties and procedure arising in judicial factories.

To the practising lawyer the last two sections are perhaps the most valuable. Specimen cash accounts are provided along with detailed instructions as to the preliminary analysis of these. This is followed by specimen accounts in which each transaction is applied to the several interests to which it relates. By following these examples carefully a complete trust account can be worked out and it will generally be found that any difficulties which arise are due to slips in one's own working. These must be avoided at all costs for accounts of charge and discharge are notoriously difficult (at least for lawyers) to " balance " once a slip has been made.

Additional features of special practical value are an Appendix giving the text of the principal statutes, the Estate Duty Regulations and Annuity Tables. A full Table of Cases and a detailed index are also furnished. All these make this book one which every practitioner will find to be a really comprehensive guide on all matters relating to trust and judicial factory accounts and incidentally on most points of accounting likely to arise in the winding up of executry estates. In short, this new edition of *Wardhaugh on Trust Law and Accounts* can be confidently recommended as one of the essential " tools of trade ".

A Text-Book of Jurisprudence. Second Edition. By George Whitecross Paton, B.C.L. (Oxon), M.A. (Melbourne). 1951. Oxford at The Clarendon Press. London : Geoffrey Cumberlege. Price 30s. net.

The first edition of this work was reviewed in *The Juridical Review* for August, 1946. Some substantial changes are made in this second edition. New sections have been added on : Bentham; Comparative

Law; Post-Classical Law; Custom (now to be found in its proper place among Sources); Statute Law; Sale and Hire-Purchase; Bailment. Several other sections have been recast or expanded or otherwise modified to take account of recent developments. Some re-arrangement of the material allows the work to be now divided into six Books: Introduction; The Purpose of Law (including a rewritten "Analysis of Law on the Basis of Interests"); Sources; Technique; Public Law; Private Law. The effect of these changes is good; they give the work more definite shape and coherence. Moreover, at several points the author has allowed himself to give a positive indication of his own views instead of confining himself to a mere formulation of the problems involved. For all this we are grateful. We are less grateful that some of our own earlier observations have apparently gone unmarked. The account of *ius gentium* (pp. 80–81) still takes no account of Schulz; the inaccurate statement about the termination of parental power in Roman Law still stands (p. 135); so do "act of forbearance" for "act or forbearance" (p. 233) and "element or wealth" for "element of wealth" (p. 410); so do the questionable doctrine that there is "no injustice" in fining a person who is morally innocent (p. 286) and the perplexing use of the phrase "object of the contract" in two different senses on p. 354 and p. 355. In the new sections we have discovered two mistakes. On p. 361 "it was customary for the buyer to stipulate that he would pay damages if the purchaser was evicted" should be amended either to "it was customary for the purchaser to stipulate that the vendor would . . ." or to "it was customary for the vendor to promise by stipulation that he would . . ."; and on p. 86 the printer has made nonsense by confusing the opening lines of two consecutive paragraphs. Nevertheless it remains true that, as we said before, this is an important work and that the second edition is even better than the first.

Rent Restrictions. By E. Dangerfield. This is the Law Series. 1951. London: Stevens & Sons, Ltd. Price 8s. 6d. net.

This is the latest addition to that admirable series entitled "This is the Law".

Miss Dangerfield has set herself the formidable task of preparing a short summary of the Rent Restrictions Acts, and that task, as Mr. Megarry points out in his foreword, "requires not only ability but courage in a high degree". The result is an admirably lucid little summary which avoids alike the dangers of over-generalisation and of hair-splitting distinction. This is a branch of the law in which it is notoriously easy to lose sight of the wood in gazing at the trees, and even experienced practitioners can hardly fail to read parts of this book with profit. The section on Statutory Tenancy is an excellent case in point.

But in noticing this booklet in a Scottish Review, one must respectfully protest, not about the complete ignoring of the distinctions between the laws of England and Scotland (for we are by now inured to that) but about the failure to point out that such differences exist. This is no idle nationalistic quibble. The series is aimed at the general public, not the legal profession. Some of the books do, in fact, take account of Scottish conditions—for example, the volume on *Local Rates*. Surely, it is not too much to ask that it be made clear (when conditions are different) whether or not these differences have been noted. Imagine, for instance, what could happen if a Scottish landlord who fancies himself as an amateur lawyer (and there are people in that category as every solicitor knows) reads this on page 85: " If the landlord pays the rates levied on a dwelling-house he is entitled to make an increase in the rent if, at any time, the rates are raised ". Let him apply that, and see where he lands himself! Or this, on page 56: " . . . A yearly tenant of a dwelling-house is impliedly liable to keep the premises wind- and water-tight, unless the tenancy agreement provides otherwise ".

The tragedy is that though these blemishes do not affect the exposition of the Rent Acts themselves they, and others, do render this a most dangerous book to put before the Scottish laity.

Miss Dangerfield states that she has in mind also the needs of the student. Here one may venture to suggest the true merit of the book lies. The present reviewer succeeded in going right through the university without hearing of the Rent Acts except in passing. Yet they are of vital concern in nearly every legal practice. They must be learned and the empiric method of doing so is certainly the wrong one. Miss Dangerfield's book will provide the student (and many a practitioner) with a starting point for the study of the Acts as a whole or of some special point in them. To such a person the dangers of the purely English exposition will not exist, as he will automatically make allowances for this. He will find this book of great value, more especially as it follows the plan of *Megarry's* standard work on the Acts. He can thus easily follow up in detail any topic which may happen to interest him.

The Technique of Advocacy. By John H. Munkman, LL.B. 1951. London: Stevens & Sons, Ltd. Price 17s. 6d. net.

The author of this book, which is intended mainly for beginners, says it should be regarded as not by an advocate founded on his own experience, but by an independent person after careful assessment of a large volume of evidence and with great keenness to penetrate the first principles of the subject. It is based on standard biographies of outstanding lawyers and verbatim reports of important trials and observation of day-to-day cases and its aim is " to extract from those varied sources some of the general principles governing the technique of advocacy " and to form a practical guide to the study of that technique.

Advocacy is an art, and while practical experience is necessary for proficiency there are rules of technique which must first be learned. Many a case has been lost through lack of knowledge of them. Thus, there is need for caution and skill in approaching dangerous and critical questions as explained and illustrated at p. 98.

Beginning with the Nature and Aims of Advocacy, the author passes on to deal with the Technique of Interrogation in General, Examination in Chief, Cross Examination with its three methods of Confrontation, Probing and Insinuation; Re-examination, Formulation of Arguments, the Speeches, and concludes with a chapter on Strategy. of which the foundation is a sure knowledge of the case, and Tactics.

The technique, particularly in cross, is illustrated from such well-known cases as the Tichborne and Wilde cases and the trials of Casement, Crippen, Dickman, Day and Smith, and Wallace, and also, which will be especially interesting to the Scots reader, of Laurie (the Arran murder case), from which excerpts are given of the cross-examinations of the Lord Advocate (Graham Murray) and of the Dean of Faculty (J. B. Balfour).

As the author points out, the teaching of the technique of advocacy would not be out of place in university courses. Yet, though it is as important a study as that of the laws of evidence, there is no textbook and it forms no part of the curriculum of any university law course. The subject is worthy of research, and Mr. Munkman suggests researches might profitably be made into the history of the growth and development of cross-examination and its technique in England and Scotland.

The book can be confidently recommended to the law student and young advocate as a most helpful introduction and guide to the principles of advocacy. And the experienced advocate will also find it of interest.

The International Law of Recognition. Ti-Chiang Chen. 1951. London : Stevens & Sons, Ltd. Price £4 4s. net.

This scholarly work should be read by all those who advocate the bindingness of international law on the one hand and condemn Britain's recognition of the Peking Government of China on the other. The fair inference from the author's argument is that if international law is to be law at all it must be obligatory in character, and not malleable at the will of individual States. A consequence is that recognition, in so far as it constitutes acknowledgment by existing States of a new State, does not confer statehood on the latter entity, that has already been attained, it but acknowledges a *fait accompli.* Statehood is not a quality dependent on the consent, often dictated by political expediency, of the recognising State or States, but the satisfying by the new entity of the " requirements of statehood as laid down by international law " (p. 62). This is the declaratory theory of which the author is a strong supporter. The opposing theory, the constitutive, holds recognition to be the act whereby the new State is created a State and member of the international community, and unless and until recognition be accorded the new entity, whatever else it may be, is not a State. Dr. Chen shows that this difference is not one of terminology alone but goes to the root of the nature of international law. He demonstrates that the constitutive theory, based as it is on the " consent " of sovereign States, is destructive of the obligatory character of an international law having its foundation in the doctrine of unrestrained sovereignty, the positivist doctrine. He observes " The analysis of the positivist doctrine leads to the conclusion that this doctrine is faced with two alternatives, either to presuppose an objective juridical order above the State, thereby renouncing its claim as a legal theory, or to reject the binding force of international law, thereby amounting to a negation of international law *qua* law" (p. 26).

This may be perfectly true, but it does not follow, as the author seems to think, that the declaratory theory proves the obligatory character of international law, it is consistent with such a conception of international law, but scarcely goes further. It is highly debatable whether the destruction of the consensual basis of international law necessarily demonstrates "the existence in the international community of a legal order to which States are subject, and which they are not free to reject at will" (p. 27). Dr. Chen appears to think that the emergence in fact of an entity of the nature of a State into the international community proves this last proposition. He asserts: "To deny that an unrecognised State exists in law is to create a legal vacuum within the borders of that State" (p. 38). On this reasoning it follows that the status of "civil death" is inconsistent with the specific legal system which contains that status. The great illusion is the use of "law" and other juridical terms to factual phenomena which daily refute any binding objective order save, and only in so far as, it quadrates with political expediency.

This work is stimulating, eminently readable, and well produced. The bibliography, read in the light of the index, speaks of the author's learning. A Scots lawyer is pleased to note that the name of Lorimer does not go unmentioned, but suggests that to the statement "The non-recognition of a State does not and cannot suspend all intercourse between individuals across the border. Economic and social activities must be continued" (p. 37) might be added the further reference—"Galbraith-Miller: *Law of Nature and Nations*, p. 71".

Recent Trends in The Law of the United Nations. Professor Hans Kelsen. 1951. London: Stevens & Sons, Ltd. Price 10s. 6d. net.

This work is supplementary to the author's *The Law of the United Nations*, and deals with four major developments in world events since the publication of the main work. These events are the existence of the North Atlantic Treaty, the action in Korea, the reappointment of the Secretary-General, and the resolution of the General Assembly: "Uniting for Peace". The date of the introduction is February, 1951, hence in respect of the first two events, at least, the supplement has ceased to be current. This does not make it valueless, for if the work has any message at all, it is that "lack of unanimity of the five great Powers has paralysed the system of collective security established in the Charter, and has prevented, or at least hampered, the exercise of other important functions of the Organization" (p. 911). Professor Kelsen sees these recent events as "attempts to find a way out of the impasse into which the unfortunate rule of unanimity has led the United Nations" (p. 911), and possibly "as the first steps in the development of a new law of the United Nations" (p. 912).

Criticism of any work bearing the high authority of Professor Kelsen's name is a bold, if not a rash, undertaking, yet the reviewer feels constrained to offer two criticisms. The first is the assumption, which permeates the supplement and the main work, that there is a Law of the United Nations, at least in the sense that there is a law of Scotland, and that the former can be treated methodologically in the same way as the latter. Despite the asseveration of Sir Cecil Hurst that " International law is in fact binding on States because they are States " (*Collected Papers*, p. 8), the pungent observation of the late Professor Buckland has lost none of its force: " Law and political morality are different things and it is desirable to eliminate confused writing in scientific work " (" Some Reflections on Jurisprudence ", p. 8), and this reviewer holds the opinion that failure to observe this distinction constitutes a formidable flaw in the author's analysis. It is true that the Companies Act, 1948, is part of the law of Scotland, but it is not true, in the same sense, to say that the articles of association of a company incorporated under that Act and registered in Scotland are part of the law of Scotland. Were this distinction taken then it is at least doubtful whether the author's careful examination of the Charter could have led him to expound as a possible interpretation of Article 2, para. 6 of the Charter that " the main obligation of the members, especially the obligation stipulated in Article 2, paragraph 4: to refrain from the threat or use of force, is extended to non-Members ".

The second is that the supplement lacks point. The author, in his introduction observes that the events therein dealt with " may, in some of their aspects, be considered unconstitutional. But directing our view towards the future, we may see them as the first steps in the development of a new law of the United Nations " (p. 912). Allowing for the fact that the work is supplementary, it is yet disappointing in this respect that nowhere does the author hazard a conjecture as to what, in his opinion, is this " development of a new law ".

Yet the work is of great merit. The author's analysis is acute and penetrating, and his findings will be an indispensable guide to anyone who seeks to understand the pattern of behaviour at Lake Success.

Kerly on Trade Marks. Seventh Edition. By R. G. Lloyd, Barrister-at-Law, and the late F. E. Bray, K.C. 1951. London: Sweet & Maxwell, Ltd. Price £7 7s. net.

There is a section in Glanville Williams's *Learning the Law* where the author usefully lists some standard works so that the young lawyer may early learn to associate a name with the leading textbook on a given topic. Among these household words of the profession, *Trade Marks* and *Kerly* are invariably associated. The Register of Trade Marks dates originally from 1875 and in 1894 Sir Duncan Kerly published his first edition on the topic. By 1927 the book had reached a sixth edition and achieved the status of the leading authority. The volume of Scottish litigation on this involved but fascinating branch of the law of commercial property has never justified a purely Scottish book but the statute law is common to both countries and *Kerly* cites all the chief Scottish authorities. In 1938 the Trade Marks Act consolidated the statute law and made some very material modifications therein. It is a complex and difficult Act and one on which the practitioner welcomes every assistance.

The new *Kerly*, begun shortly after the 1938 Act and now brought to completion, should give as valuable assistance as previous editions have done for so long. The opportunity has been taken to make substantial rearrangements in the text within the same general framework as previous editions.

There is an entirely new chapter on Deceptive Resemblance covering an important topic which arises in several different connections, such as applications to register, or for rectification, in actions for passing off or for infringement. The definition of deceptive resemblance is, however, tautological and circuitous but the following sections propounding criteria of comparison are sound and there are valuable collections of contrasted devices and contrasted words. Similarly the chapter on the Merchandise Marks Acts has been lengthened with advantage.

The Scots lawyer is probably more concerned with infringement and passing off than with most other heads of this branch of the law, and on these topics there is a wealth of information running to more than two hundred pages and incorporating the modern developments and authorities.

The Appendices give the Act of 1938 and earlier Acts, the Merchandise Marks Acts and various relevant S. R. & O.s. It is possibly a pity that the three pages of Appendix VIII of the last edition, which gave useful forms of orders by the Court in trade mark cases, have not been retained.

There are the merest few quibbles : on p. 426 " Traynor " should read " Trayner "; on p. 526, n. 12, the date of 20 R. should be 1893; and at p. 717 there might possibly have been a reference to *Royal Warrant Holders Association* v. *Robb*, 1935 S.N. 32. But these trifles do not detract from the great value of this new edition and the conviction that it will maintain *Kerly* in its position of pre-eminence in this field, and the profession is indebted to the editors for their diligence and to the publishers for a worthy instalment in their onerous programme of providing post-war editions of standard authorities.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

The Law List 1951. 1951. London : Stevens & Sons, Ltd. Price 25s. net.

The International Court of Justice. By Oliver J. Lissitzyn. United Nations Studies, No. 6. 1951. New York: Carnegie Endowment for International Peace.

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